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Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-748

FRANK IREY, JR., INC.,

Petitioner,

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION, AND JOHN T. DUNLOP, SECRETARY OF LABOR,

Respondents.

No. 75-746

ATLAS ROOFING COMPANY, INC.,

Petitioner,

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION AND JOHN T. DUNLOP, SECRETARY OF LABOR,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE THIRD AND FIFTH CIRCUITS

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

INTRODUCTION

The Government offers three arguments to justify affirmance of the judgments below in these cases. First, the Government contends that the Seventh Amendment is not applicable to cases in which the Government is a party. We respond to this contention in Section I of this reply brief, at pp. 1-32 *infra*. Second, the Government contends that Congress may permissibly bypass both Article III and the Seventh Amendment and delegate to an administrative non-jury adjudicator any cases or controversies which fall at least within the scope of Congress' regulatory powers under Article I of the Constitution. We respond to this contention in Section II of our brief at pp. 32-56 *infra*. Finally, the Government contends, relying primarily on this Court's decision in *Katchen v. Landy*, 382 U.S. 323 (1966), that these cases may permissibly be delegated to an administrative non-jury adjudicator because recognition of a jury right in District Court after the administrative process is complete will result in dismembering the statutory scheme. We respond to this contention in Section III of this brief, at pp. 56-70 *infra*.*

*In this brief we shall use the same citation forms for the various appendices previously filed with the Court as we utilized in our initial brief. See Irey Main Br., at 2, n. 1. For the legislative history of the Occupational Safety and Health Act [hereinafter "OSHA" or "the Act"], we shall use the one-volume Committee reprint utilized by the Government in its brief and shall similarly cite this source as "Leg. Hist." See Gov. Br. 4, n. 2. We shall cite Schwartz, *The Bill of Rights: A Documentary History* (1971), as "Schwartz" with the appropriate volume designation. See Gov. Br. 20, n. 11.

I.

THE SEVENTH AMENDMENT APPLIES TO SUITS IN WHICH THE GOVERNMENT IS A PARTY.

A. Introduction

The Government's "primary argument" (Gov. Br. at 17) is

> that the Seventh Amendment was never intended to control government litigation of *any kind, in any forum*.

Id., 17-18 (emphasis in original).

The Government's contention must be placed in the basic context of our Constitution and the Bill of Rights, and particularly Article III and the Seventh Amendment. "For as every schoolboy knows, the Framers 'designed' the Bill of Rights not against 'state power,' but against the power of the Federal Government." *Williams v. Florida*, 399 U.S. 78, 145 (1970) (Stewart, J., concurring and dissenting). Specifically, the Seventh Amendment was added in direct response to the omission of a civil jury provision in Article III of the new Constitution, which in turn created a Federal judicial power capable of acting directly upon the citizens of the State in executing Federal law and enforcing Federal interests in enumerated categories of cases or controversies, including those arising under the Constitution, law and treaties of the United States, those "between a state and citizen of another state," and those "to which the United States shall be a party."[1] In fact, the ninth section of the Federal

[1] As the Government puts it (Gov. Br. at 26):

> What is more, since Article III authorized the establishment of federal trial courts with a very wide civil jurisdiction, there was no escaping the question whether congress should, or should not, be left free to withhold a right to a jury for these cases.[24]

Judiciary Act of 1789, 1 Stat. 73, 76-77, considered simultaneously by the same Congress that passed the Seventh Amendment, gave the newly created district courts,

> exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation or trade of the United States, where the seizures are made, on waters which are navigable from the sea by vessels of ten or more tons burthen, within their respective districts as well as upon the high seas; (a) saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it; and shall also have exclusive original cognizance of all seizures on land, or other waters than as aforesaid, made, and of all suits for penalties and forfeitures incurred, under the laws of the United States.

See Irey Main Br. at 23. As we noted in our initial brief, the attempt of the English Crown to expand the Admiralty jurisdiction as a device for evading common law jury rights in civil penalty and forfeiture actions arising under the Acts of Trade is what made the deprivation of jury rights a focal point of the American Revolution to begin with. Irey Main Br. 25-31. *See also C.J. Hendry v. Moore, supra,* 318 U.S. 133, 141 (1943).[2]

The Seventh Amendment reads (emphasis added):

> *In suits at common law,* where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise reexamined in any

[2] The Government acknowledges this much. *See* Gov. Br. 40-41:

> To be sure, it is familiar history that in the decade before Independence, Americans inveighed against the practice of assessing and enforcing fines and forfeitures through so-called "vice-admiralty" courts without juries. That is sufficiently reflected in public remonstrances from 1765 through 1776.[68] But it does not follow that the Seventh Amendment was a response to that concern.

> court of the United States, than according to the rules of the common law.

In construing this language, this Court, throughout its 200 year history, has repeatedly and at length pronounced as one of the most basic canons of construction, that "[t]he right of trial by jury thus preserved is the right which existed under the English common law when the amendment was adopted." *Baltimore & Carolina Line v. Redman,* 295 U.S. 654, 657 (1935); *Capital Traction Co. v. Hof,* 174 U.S. 1, 7-8 (1899); *United States v. Wonson,* 1 Gall. 4, 20 (C.C. Mass. 1812). Nor is this canon of construction the product of careless assumption once asserted and repeated automatically down through the years. Rather the principle reflects the considered judgment of one of the Court's greatest scholars closest in time to the Constitution (Justice Story), and is rooted, *inter alia,* in this Court's own review of the "legislative history" of the Constitutional Convention and the time period preceding the Seventh Amendment's enactment. *See Colgove v. Battin,* 413 U.S. 149, 152-56 (1973). And that canon of construction is also rooted in a more general and equally fundamental principle of this Court's constitutional jurisprudence:

> The language of the Constitution cannot be interpreted safely except by reference to the common law and to British institutions as they were when the instrument was framed and adopted. The statesmen and lawyers of the Convention, who submitted it to the ratification of the Convention of the thirteen states, were born and brought up in the atmosphere of the common law, and thought and spoke in its vocabulary. They were familiar with other forms of government, recent and ancient, and indicated in their discussions earnest study and consideration of many of them, but when they came to put their conclusions into the form of fundamental law in a compact draft, they expressed them in terms of the common law, confident that they could be shortly and easily understood.

Ex parte Grossman, 267 U.S. 87, 108-09 (1925).

As we have shown in our initial brief, a governmental action for a forfeiture or penalty based on a statutory violation was a classic instance of a "common law" suit under English and contemporary American practice at the time of the adoption of the Seventh Amendment. Irey Main Br. at 32-38. Respecting governmental proceedings for forfeiture of property based on statutory violations, this Court, in *C.J. Hendry v. Moore, supra*, extensively examined the contemporaneous American understanding of the phrase "common law remedy" as used in section nine of the First Judiciary Act and concluded – based on an in-depth canvassing of cases from Virginia, Maryland, Massachusetts, New Jersey, Pennsylvania, New Hampshire, Connecticut, Maine, and New York (318 U.S. 140-48) – that

> In general the suits were brought against the vessel or article to be condemned, were tried by jury, closely followed the procedure in Exchequer, and if successful resulted in judgments of forfeiture or condemnation with a provision for sale.

318 U.S. at 140. *See also id.* at 153 ("In all this we perceive a common understanding of judges, lawyers and text writers, both before and after the adoption of the Constitution, of the common law nature of the procedures and judgment *in rem* in forfeiture cases and of its use in such proceedings in the Exchequer and in the American common law courts").[3] *See also United States v. Wonson*, 1 Gall. at 14 (Irey Main Br. 39-40, n. 21) (federal governmental proceeding for penalty under Federal Statute).

[3] Chief Justice Stone's opinion in the *Moore* case has been described as

> at once a monumental piece of erudition and a notable contribution to the meaning of the much mooted phrase "common law remedy."

Dickinson & Andrews, *A Decade of Admiralty in the Supreme Court of the United States*, 36 Cal. L. Rev. 169, 173 (1948).

Thus, as we asserted in our initial brief, under the traditional criteria for determining the content of the Seventh Amendment phrase "suit at common law," governmental proceedings for penalties or forfeitures were within the very core of the constitutional concept. Irey Main Br. at 72. See generally *People v. One 1941 Chevrolet Coupe*, 37 Cal. 2d 283, 231 P.2d 832 (1951).[4] *The Government, throughout its 91-page submission never once challenges this assertion.* Rather, the Government now urges this Court to discard its fundamental canon of construction (*see* Gov. Br. at 19-20) and to interpret the phrase "suit at common law" as limited to civil suits in which the Government is not a party.[5] The claimed exemption has no basis in the text of the Seventh Amendment. Moreover, the exemption would contradict the contemporaneous understanding

[4] In *One 1941 Chevrolet Coupe, supra*, the California Supreme Court presents another extensive historical survey of English and American practice in support of its holding that under the California Constitution there is a right to trial by jury in a state proceeding to forfeit a car used to transport narcotics. *See id.* at 286-98, 231 P.2d at 835-43.

[5] As we understand the Government's primary argument, the distinction the Government urges is between civil cases in which the litigants are private as opposed to those cases in which the Government appears as a litigant. Under this theory, presumably other Federal Question cases in Federal Court in which the litigants are private persons *would* be governed by the Seventh Amendment if the remedy sought were money damages in excess of $20. *See, e.g., Curtis v. Loether*, 415 U.S. 189 (1974).

But the Government's statement of its theory on this point is not at all clear. Thus, at pp. 43-44 we are told "[The Seventh Amendment] dealt only with that private litigation where a civil jury had been traditional, which the federal courts might now entertain by virtue of diversity jurisdiction. All other cases, including the new field of litigation involving the federal government, were left to be provided for by legislation." That statement implies a dichotomy identical to the "Article I–plenary-public rights" theory (see pp. 32-56 *infra*), but the Government seems to inform us, in the course of articulating that theory, that the historical argument "is . . . limited to situations in which the government is the protagonist." Gov. Br. at 62.

of the language of the Seventh Amendment as shown by practice in the State and Federal Courts at the time of the Amendment's adoption. Finally, the exemption presupposes a willingness on the part of the States to free the Federal Government of the restraint of a common law jury in the very class of cases where the citizens of the respective states had actually experienced the oppression that results when a remote central governmental power chooses to evade the local lay jury in pursuit of its own substantive governmental interests.

B. The Government's Argument From Historical Evidence

The Government constructs the following argument from "the historical evidence" (Gov. Br. at 20):

> 1. Between 1776 and 1783 six states (Virginia, Pennsylvania, North Carolina, Vermont, Massachusetts, and New Hampshire) adopted constitutional provisions concerning civil jury rights which included a phrase like "between man and man" or a reference to "controversies respecting property" but made no reference to "disputes to which the Government is a party" (Gov. Br. 21-25; quote from p. 23);
>
> 2. Five of these states (Massachusetts, New Hampshire, Pennsylvania, Virginia, and North Carolina) in their proposed civil jury trial amendments to the new Constitution included language like "between man and man" and "controversies respecting property" with no reference to "governmental litigation" (Gov. Br. 27-30; quote from p. 27);
>
> 3. James Madison's original draft of the Seventh Amendment similarly included the phrase "between man and man" and its deletion from the final text should be construed as "stylistic improvement only, not change of substance." (Gov. Br. 30-37; quote from p. 33.)

We deal with each point in turn.

1. *The Interpretation of the Government's Key Phrases in Light of Contemporaneous State Practices* – As we have noted, this Court in *C.J. Hendry v. Moore, supra,* extensively surveyed contemporaneous practices respecting jury trials and common law remedies in State forfeiture actions for statutory violations in Virginia, Maryland, Massachusetts, New Jersey, Pennsylvania, New Hampshire, Connecticut, Maine and New York.[6] *See id.*, 318 U.S. at 140-48. The California Supreme Court, in *People v. One 1941 Chevrolet Coupe,* 37 Cal. 2d at 297-98, n. 18, 231 P.2d at 842, n. 18, summarized the results of that historical survey as follows:

> Footnotes 4, 5, and 6 to the opinion in *C.J. Hendry Co.* v. *Moore*, 318 U.S. 133, 63 S. Ct. 499, 87 L. Ed. 633, contain references to many such cases. In Virginia by 1690 forfeiture cases under the Navigation Acts were tried at common law by a jury. In Maryland forfeiture cases were tried generally in courts of oyer and terminer acting with the jury. In Massachusetts forfeiture cases under the Navigation Acts were regularly tried by the Court of Assistants before juries, apparently in the same manner as other common-law cases. In New Jersey proceedings to condemn forfeited property were tried in the court of common pleas with jury as early as 1679. In Connecticut a cargo of a vessel was condemned by a jury in the county court in 1692. In Maine a vessel was cleared by a jury in 1680. Idem. footnote 4. In New York before 1691 forfeiture cases were tried in the General Quarter Sessions of the Peace with a jury; after 1691 in the Supreme Court of Judicature with a jury. *C.J. Hendry Co. v. Moore,* 318 U.S. 133, 63 S. Ct. 499, 87 L. Ed. 663, 670, and footnotes 5-9.

In the face of the *Moore* Court's historical evidence, it is unquestionable that the American judges, lawyers,

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[6] The only one of the Government's five states not covered in the *Moore* case survey is North Carolina.

and scholars of the relevant time period would have understood the phrase "suit at common law" to include "governmental litigation" (Gov. Br. at 27) or "disputes to which the Government is a party" (*id.*, at 23). Nor does the Government seriously maintain the contrary.[7] Rather, the Government relies on the underscored verbal expressions as illustrated by the Virginia State Constitutional provision (Gov. Br. 22-23, emphasis added):

> That in *controversies respecting property*, and in suits *between man and man*, the ancient trial by Jury is preferable to any other, and ought to be held sacred.

In the Government's view, these underscored phrases signify a dichotomy between suits in which the Government is a litigant and suits in which only private persons are litigants. But no historical evidence is tendered respecting contemporaneous practice in the Virginia courts (or any other state court) to sustain the Government's assertion that its "Government litigant – private litigant" dichotomy is the true meaning of the Eighteenth Century Virginian choice of phrases. Rather, virtually the whole of the Government's position is

[7] We say "seriously" in this sentence in the text, since at various points in its brief the Government offers verbal formulations of its position suggesting that colonial and American lawyers would have viewed an action based on a statute as not a "common law" action. *See* Gov. Br. at 29, n. 31: ("The exclusion of 'federal question' cases probably reflects the view that causes of actions created by written laws were not suits 'at common law,' which, alone, were meant to be embraced."); *id.*, at 58 ("In sum, we contrast 'public law' and 'common law' "). Whatever the Government's meaning in these unsupported assertions (*see also* note 5, *supra*), the Government tenders no "historical evidence" to counter our showing that a civil governmental action based on a violation of a statute and seeking a penalty or forfeiture was a classic "common law" action in England and the American States for jury trial purposes.

pitched squarely on a linguistic inference the Government draws from these phrases:

> This language is obviously chosen to govern *private* litigation. We need hardly belabor the point that the reference to "suits between man and man" is inapt to describe disputes to which the government is a party. Arguably, the category of "controversies respecting property" is more open-ended. The more natural reading, however, is that it encompasses only private actions *in rem*, or *quasi in rem*, as distinguished from personal actions. It is not a formula which easily encompasses actions initiated by the government, certainly not the collection of monetary penalties. But we need not finally construe the words "controversies respecting property" since this clause of the Virginia provision (unlike the description "suits between man and man") was left aside by Madison when he drafted the Seventh Amendment. . . . Gov. Br. 22-23 (emphasis in original).

We find the Government's "natural reading" most unnatural. Thus the word "private" appears nowhere in the Virginia provision, and, in particular, the expression "controversies respecting property" is not limited to "private" as opposed to "governmental" actions. Indeed, the *Moore* case states, respecting Virginia practice:

> [4] VIRGINIA: In the 1670s forfeitures under the Navigation Acts were declared by the Council. See Minutes of the Council and General Court of Colonial Virginia, 1622-1632 and 1670-1676 (ed. McIlwaine, 1924), pp. 212, 214, 216, 242-44, 445-46. But by the 1690s such cases were tried at common law in the General Court before a jury. Although the records of the General Court were destroyed by fire during the evacuation of Richmond in 1865, copies of some of its more important proceedings during the 1690s, contemporaneously transmitted to England, have been

preserved, and are reprinted in Executive Journals of the Council of Colonial Virginia (ed. McIlwaine, 1925), vol. I. See the cases of *The Anne & Catherine*, pp. 173-75; *The William & Mary*, pp. 241-43; *The Content*, pp. 379-80; *Cole v. Three Pipes of Brandy*, pp. 204-05; cf. *The Crane*, pp. 233-34, 300; *The Catherine*, pp. 263-64; *The Society*, pp. 196-97, 219, 235-36, 252-53. See also the cases of *The Elezabeth* and *The Mary & Ellery*, in Edward Randolph, Including His Letters and Official Papers (ed. Toppan, 1899), vol. 5, p. 139; *The Crown*, condemned by a jury at a special court in 1687, 12 Va. Mag. of Hist. & Biog. 189. The Governor exercised a power to commission a special admiralty court in the cases of a prize (*The St. Ignace*, Exec. J., vol. I, pp. 366-67, 368-69), but apparently not for condemnation cases under the Acts of Navigation. An admiralty court, for Virginia and North Carolina, was established in 1698. Id., p. 379; Chitwood, Justice in Colonial Virginia, pp. 71-73.

318 U.S. at 140, n. 4.

Thus in Virginia governmental seizures of property for statutory violations were triable to a jury where the siezure was beyond the admiralty jurisdiction. This was characteristic of most of the colonies; *i.e.*, while most *in rem* actions were admiralty cases, the common law had a limited *in rem* procedure for seizures of property on land defined in the main by the practice in the English Exchequer:

> The common law as it was received in the United States at the time of the adoption of the Constitution did not afford a remedy *in rem* in suits between private persons. Hence the adoption of the saving clause in the Judiciary Act, as this Court has held in cases already cited, did not withdraw from the exclusive jurisdiction of admiralty that class of cases in which private suitors sought to enforce their claims by the seizure of a

> vessel in proceedings *in rem*. But to the generalization that a judgment *in rem* was not a common law remedy there is an important exception. Forfeiture to the Crown of the offending object, because it had been used in violation of law, by a procedure *in rem* was a practice familiar not only to the English admiralty courts but to the court of Exchequer. The Exchequer gave such a remedy for the forfeiture of articles seized on land for the violation of law. And, concurrently with the admiralty, it entertained true proceedings *in rem* for the forfeiture of vessels for violations on navigable waters.[1] Such suits in the Exchequer were begun on information and were against the vessel or article to be condemned. Under the provisions of many statutes the suit might be brought by an informer *qui tam*, who was permitted to share in the proceeds of the forfeited article; the judgment was of forfeiture and the forfeited article was ordered to be sold. This was the established procedure certainly as early as the latter part of the seventeenth century.[2] Proceedings *in rem*, closely paralleling those in the Exchequer, were also entertained by justices of the peace in many forfeiture cases arising under the customs laws (see Hoon, The Organization of the English Customs System, 1696-1786, pp. 277, 280-83), and the Act of 8 Geo. I, c. 18, §16, placed within that jurisdiction the condemnation of vessels up to fifteen tons charged with smuggling.

C.J. Hendry v. Moore, 318 U.S. at 137-38.

Thus, the lawyers of Virginia (and the other states), in drafting their Constitution, faced a need to preserve not merely the common law remedy in *in personam* actions, but also the limited common law remedy in property seizures beyond the admiralty jurisdiction. One way to accomplish this legislative goal is to specify jury rights in "suits between man and man" (common law *in personam* actions) and "controversies respecting

property," (common law *in rem* actions) trusting to the judicial process to draw the line in the latter cases between admiralty and common law *in rem* actions based on then-established practice respecting "the ancient trial by jury."

Another way to accomplish this legislative goal is to spell out expressly the admiralty and martime exemption, as in the nearly identical Massachusetts and New Hampshire provisions:

> In all controversies concerning property, and in all suits between two or more persons, except in cases in which it has heretofore been otherways used and practiced, the parties have a right to a trial by jury; and this method of procedure shall be held sacred, unless, in causes arising on the high-seas, and such as relate to mariners wages, the legislature shall hereafter find it necessary to alter it.

Massachusetts Declaration of Rights of 1780, Art. XV, in 1 Schwartz 342.

A third possible way of expressing the same legislative goal is suggested by Maryland's proposed amendment to the Federal Constitution (Art. 3, 2 Schwartz 732):

> That, in all actions on debts or contracts, [typical *in personam* common law writs] and in all other controversies respecting property, [covering possible common law *in rem* actions], of which the inferior federal courts have jurisdiction, the trial of facts shall be by jury, if required by either party; and that it be expressly declared that the state courts, in such cases, have a concurrent jurisdiction with the federal courts with an appeal from either, only as to matter of law, to the Supreme Federal Court, if the matter in dispute be of the value of ____ dollars.

But the difficulty with this form of specification (and, indeed, any attempt at specific enumeration of

cases by subject matter, party-litigant, or type of writ in a Bill of Rights) is that the chosen language will never be exactly congruent with the fundamental goal of the Constitution-writer; *i.e.*, to preserve the existing jury right based on the historical practice and experience of the people, in light of changes to be anticipated in the regime of law in the future. Thus, the better draftsman's option is the choice of appropriate generic categories as per the Seventh Amendment ("suits at common law") trusting in the wisdom of future lawyers and judges to seek explication of the chosen terminology in light of the historic legal practice and vocabulary of the time. *See Ex Parte Grossman*, 267 U.S. at 108-09.

Moreover, it is in any event unlikely that the lawyers of the Colonial and Revolutionary eras would have intended to express a "government litigant" – "private litigant" dichotomy through verbalisms such as "suits between man and man" and "controversies respecting property." Thus, in the area of penalties for statutory violations, one of the particular modes of procedure well known to lawyers and judges of the day was the *qui tam* action; *i.e.*, an informer's action brought by a "private" person "man to man," as it were, to vindicate the governmental interest. And these *qui tam* actions based on statutory violations applied to *in personam* actions for monetary penalties (*see* 2 Legal Papers of John Adams, at 181 & n. 28 [Z.L. Wroth & H. Zibot, eds. 1965]) and *in rem* forfeiture actions. See *C.J. Hendry v. Moore*, 318 U.S. at 137-38. In fact, the *qui tam* proceeding to enforce the governmental interest in monetary penalty actions was one of the established "common law" jury actions in English practice. *See* Irey Main Br. at 36-37.

In sum, the government's "private litigant – Government litigant" dichotomy fits nowhere in the scheme of common law writs and procedures known to contemporary practitioners.[8] The more natural interpretation of the original intent of the authors of these constitutional provisions expressed in terms of "controversies respecting property" and "suits between man and man" is that they intended to preserve the existing common law jury

[8] The Government seeks "confirmation" of its interpretation of the Virginia Constitutional provision in "the 1776 [Virginia] convention's rejection of Jefferson's more inclusive proposals . . ." Gov. Br. at 23.

Jefferson's proposals (as reproduced in the Schwartz compilation) were presented as part of his draft for the Judiciary power section of the Virginia Constitution. 1 Schwartz 243-246. Immediately preceding the civil jury provision, the Jefferson draft spells out the tenure attributes for judges of all branches of the proposed Virginia Court system (General Court, High Court of Chancery, County Courts and "other inferior jurisdictions.") Then the Jefferson civil jury provision reads:

> All facts in causes, whether of Chancery, Common, Ecclesiastical, or Marine law, shall be tried by a jury upon evidence given viva voce, in open court; but there [sic] witnesses are out of colony or unable to attend through sickness or other invincible necessity, their depositions may be submitted to the credit of the jury.

1 Schwartz 244. That provision is "more inclusive" than the "ancient trial by jury" preserved by the Virginia Bill of Rights for "controversies respecting property" and "suits between man and man" insofar as it covers non-common law courts such as the Chancery (Equity) and admiralty jurisdictions. But there is no historical evidence to suggest that Jefferson (or anyone else in Virginia) viewed the difference between the provisions in terms of the Government's "private litigant–Government litigant" dichotomy.

Jefferson's next provision appears directed at the criminal jury right:

> All Fines and Amercements shall be assessed, & Terms of imprisonment for Contempts & Misdemeanors shall be fixed by the verdict of a jury.

Compare George Mason's original draft (Section 8, 1 Schwartz 242); Virginia Declaration of Rights, Section 8 (*id.*, at 236).

right whenever a man's purse or property is attacked civilly either by the direct route of a personal suit against him or the indirect route of a suit against his property.

2. *The Jury Provisions and Proposals in Other States* – We believe we have shown that the Government's argument from historical evidence fails on its major premise: *i.e.*, the inference based strictly on the wording of six state constitutional provisions and corresponding state proposals to amend the Federal Constitution. However, assuming *arguendo* the Government's linguistic inference were correct, it is instructive to compare the Government's six states with the contemporaneous constitutional provisions of the remaining eight (including Vermont) original states.

Thus, the Constitution of the State of New York (1777) provided (Art. XLI, 1 Schwartz 312):[9]

> XLI. And this convention doth further ordain, determine, and declare, in the name and by the authority of the good people of this State, that trial by jury, in all cases in which it hath heretofore been used in the colony of New York, shall be established and remain inviolate forever. And that no acts of attainder shall be passed by the legislature of this State for crimes, other than those committed before the termination of the present war; and that such acts shall not work a corruption of blood. And further, that the legislature of this State shall, at no time hereafter,

[9] New York's Constitution had no prefatory Bill of Rights. On January 26, 1787, the New York legislature passed "An Act concerning the rights of the citizens of this State" which included the following:

> *Second*, that no citizen of this State shall be taken or imprisoned or be disseized of his or her freehold or liberties of free customs or outlawed or exiled or condemned or otherwise destroyed, but by lawful judgment of his or her peers or by due process of law.

2 Laws of the State of New York, 344-45 (1886).

> institute any new court or courts, but such as shall proceed according to the course of the common law.

Governmental suits for fines and forfeitures were common law actions triable to a jury under this Constitutional provision. *See Vergari v. Marcus*, 26 N.Y.2d 764, 257 N.E.2d 652 (1970); *Colon v. Lisk*, 13 App. Div. 195, 43 N.Y.S. 364, *aff'd* 153 N.Y. 188, 47 N.E. 302 (1897). *See generally C. J. Hendry v. Moore*, 318 U.S. at 141-48. New York's proposed Amendment to the Constitution reads (1 Schwartz 913):

> That the trial by Jury in the extent that it obtains by the Common Law of England is one of the greatest securities to the rights of a free People, and ought to remain inviolate.

Maryland's constitutional provision respecting civil jury rights reads (Art. XVII, 1 Schwartz 281):

> That the trial of facts where they arise, is one of the greatest securities of the lives, liberties and estates of the people.

Maryland's proposal to the constitutional convention is set forth at p. 14, *supra*. New Jersey's constitutional provision (1776) states (Art. XXII, 1 Schwartz 260):[10]

[10]The Government states that the constitutional provisions of New Jersey and Maryland are "vague generalities." Gov. Br. at 21. We are told New York's and Maryland's proposed amendments are "perhaps ambiguous." Gov. Br. at 28.

These efforts at characterization depend in the first instance on the Government's rejection of this Court's traditional canon of construction for ascertaining the meaning of constitutional provisions framed in the language of the common law in light of the historical experience of the times. *See* p. 5, *supra*. Thus, a jury trial right according to "the Common Law of England" is hardly ambiguous on the "historical evidence" before this Court on the point in issue in this case: *i.e.*, was government litigation presumed excluded?

Moreover, the Government's attempt to avoid the force of the proposed Maryland Amendment to the Constitution turns on the

(continued)

> That the common law of England, as well as so much of the statute law, as have been heretofore practised in this Colony, shall still remain in force, until they shall be altered by a future law of the Legislature; such parts only excepted, as are repugnant to the rights and privileges contained in this Charter; and that the inestimable right of trial by jury shall remain confirmed as a part of the law of this Colony, without repeal, forever.

Delaware's constitutional provision (1776) states (Section 13, 1 Schwartz 278):

> That trial by jury of facts where they arise is one of the greatest securities of the lives, liberties and estates of the people.

South Carolina (1779) had the following provision,[11] Art. XXV (1 Schwartz 332):

(footnote continued from proceeding page)

factually false premise that "cases of revenue" were "probably then supposed to exhaust the category of federal litigation." Gov. Br. at 28, n. 29. *See* the discussion of section nine of the First Judiciary Act at p. 4, *supra*. *See also United States v. Wonson, supra*. Indeed, the express provision in the proposed Maryland civil jury trial amendment exempting revenue cases from the normal restriction on appeals of facts in common law actions (Amend. 4. 2 Schwartz, 733) demonstrates that there could not have been a presumed "government litigant–private litigant" dichotomy in Maryland's case.

[11]That South Carolina provision is particularly interesting as a direct response to the conflict over the expansion of admiralty's jurisdiction to the derogation of common law jury rights in governmental penalty and forfeiture cases.

We do not find in South Carolina's Constitution the typical pattern of parallel provisions addressed to criminal and civil cases. But Article XLI of the South Carolina Constitution reads (1 Schwartz 335):

> That no freeman of this State be taken or imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, exiled, or in any manner destroyed or deprived of his life, liberty, or property, but by the judgment of his peers or by the law of the land.

That the jurisdiction of the court of admiralty be confined to maritime causes.

Finally, Georgia's provision (1777) reads (Art. XL, 1 Schwartz 298):

> Art. XL. All causes, of what nature soever, shall be tried in the supreme court, except as hereafter mentioned; which court shall consist of the chief-justice, and three or more of the justices residing in the county. In case of the absence of the chief-justice, the senior justice on the bench shall act as chief-justice, with the clerk of the county, attorney for the State, sheriff, coroner, constable, and the jurors; and in case of the absence of any of the aforementioned officers, the justices to appoint others in their room *pro tempore.* And if any plaintiff or defendant in civil causes shall be dissatisfied with the determination of the jury, then, and in that case, they shall be at liberty, within three days, to enter an appeal from that verdict, and demand a new trial by a special jury, to be nominated as follows, viz: each party, plaintiff and defendant, shall choose six, six more names shall be taken indifferently out of a box provided for that purpose, the whole eighteen to be summoned, and their names to be put together into the box, and the first twelve that are drawn out, being present, shall be the special jury to try the cause, and from which there shall be no appeal.

In none of these six states[12] is there even a shadow of a suggestion that the jury rights the states were seeking to preserve were somehow a function of a "private litigant – Government litigant" dichotomy. The provisions of all of these states, (and, we submit, the provisions of all twelve states) are intended to preserve

[12]Connecticut had no applicable provision. *See* 1 Schwartz 289-90. Rhode Island had no State Constitution until 1842. *Id.* at 95.

the existing jury right as interpreted in light of English and the relevant American Colonial experience. *See Ex Parte Grossman, supra.*

But, most importantly, the extraordinary range of expressions for these states (and, indeed, all the original states) demonstrates the basic correctness of the Court's interpretation in *Colgrove v. Battin, supra,* of the legislative history of the Seventh Amendment as it appears in the Federal Constitution. In the *Colgrove* case, this Court – based on its own survey of the legislative record of the Constitutional Convention and the ratification debates in the State Conventions – drew the following conclusions:

> But the omission of a protective clause from the Constitution was not because an effort was not made to include one. On the contrary, a proposal was made to include a provision in the Constitution to guarantee the right of trial by jury in civil cases but the proposal failed because the States varied widely as to the cases in which civil jury trial was provided, and the proponents of a civil jury guarantee found too difficult the task of fashioning words appropriate to cover the different state practices.[8] The strong pressures for a civil jury provision in the Bill of Rights encountered the same difficulty. Thus, it was agreed that, with no federal practice to draw on and since state practices varied so widely, any compromising language would necessarily have to be general. As a result, although the Seventh Amendment achieved the primary goal of jury trial adherents to incorporate an explicit constitutional protection of the right of trial by jury in civil cases, the right was limited in general words to "suits at common law."[9] We can only conclude, therefore, that by referring to the "common law," the Framers of the Seventh Amendment were concerned with preserving the *right* of trial by jury in civil cases where it existed at common law, rather than the various incidents of trial by jury.[10]

413 U.S. at 153-56. If the Government's linguistic inference were acceptable as a mode of interpreting the relevant constitutional language of the six states the Government relies on, this Court would then be faced with the precise disuniformity in state practice and in state proposals for constitutional amendments which necessitated a uniform federal standard based principally on contemporaneous English Common Law practice in construing the Seventh Amendment.

3. *James Madison's First Draft of the Seventh Amendment* – Perhaps the most glaring flaw in the Government's argument from historical evidence is the treatment accorded James Madison's initial draft of the Seventh Amendment, which read (2 Schwartz 1028):

> In suits at common law, between man and man, the trial by jury, as one of the best securities to the rights of the people, ought to remain inviolate.

The "between man and man" phrase – which forms the lynchpin of the Government's entire historical evidence argument – was deleted in Committee, and the Amendment came to the Floor of the House in the following form (2 Schwartz 1117):

> In suits at common law, the right of trial by jury shall be preserved. . . .

The Government explains (Gov. Br. at 33):

> When we compare this provision with Madison's draft, it is obvious the committee was condensing and sharpening language. The florid phrase "as one of the best securities to the rights of the people" is deleted as surplusage. And the shorter and more direct mandate "shall be preserved" is substituted for "ought to remain inviolate." We suggest the omission of the words "between man and man" served a like purpose: stylistic improvement only, not change of substance.

But the Government's whole historical evidence argument is built on a linguistic inference based entirely on the supposedly unambiguous meaning of the verbalism "between man and man" (Gov. Br. at 22-23, emphasis in original):

> This language is obviously chosen to govern *private* litigation. We need hardly belabor the point that the reference to "suits between man and man" is inapt to describe disputes to which the government is a party. . . .

Indeed, we are cautioned by the Government that the meaning of this verbalism is so inescapably plain that a decent respect for the professional qualifications of the Virginians who drafted the state Declaration of Rights (Mason, Madison, and others) forbids our assuming the *inclusion* of the phrase in the Virginia State provision was "inadvertant" (Gov. Br. 23):

> In sum, the civil jury provision in the Virginia Declaration, on its face, is one limited to private litigation. Considering the distinguished members of the Committee responsible for its drafting, this cannot be supposed to be inadvertant. . . .

But somehow, when we arrive at the critical step in the adoption of the Federal Constitutional provision, the deletion of this same magic phrase, so plain in meaning and significant in substantive content, by the same highly qualified lawyer, is transmogrified into a matter of:

> stylistic improvement only, not change of substance.

Gov. Br. at 33. The severity of the Government's problem here becomes compounded when the Government tries to explain itself on the point.

First, we are referred to Professor Schwartz's statement: "[t]hese changes scarcely alter the fact that the Committee version was a virtual restatement of the

amendments proposed by Madison." Gov. Br. at 34 *citing* 2 Schwartz 1050. But nowhere does Professor Schwartz adopt the Government's interpretation of the "between man and man phrase" in the original draft as supporting an inference that Madison intended to limit the civil jury right to cases brought by non-governmental litigants.[13]

Second, we are told that "[c]ertainly, with respect to the provision that became the Seventh Amendment, the committee had no reason to go further, since, as we have seen, no state had proposed a broader civil jury trial provision." (Gov. Br. at 34). That statement, we think, is not correct. *See* the discussion of the New York and Maryland proposals at p. 18 and note 10.

[13]We note that prior to Madison's first civil jury proposal, his draft included the following (2 Schwartz 1027):

> Sixthly, that in article 3d, section 2, [of the original Constitution] be annexed to the end of clause 2d, these words, to wit:
>
> But no appeal to such court shall be allowed where the value in controversy shall not amount to ____ dollars: nor shall any fact triable by jury, according to the course of the common law, be otherwise re-examinable than may consist with the principles of common law.

His civil jury right draft appeared in the following paragraph (1 Schwartz 1028):

> In cases of crimes committed not within any county, the trial may by law be in such county as the laws shall have prescribed. In suits at common law, between man and man, the trial by jury, as one of the best securities to the rights of the people, ought to remain inviolate.

Under Madison's original format, it would appear that the intent was to protect the right generally to trial by jury according to the course of the common law, and the "between man and man" phrase was simply a way of distinguishing civil from criminal litigations. *Cf. Capital Traction Co. v. Hof, supra*, 174 U.S. at 16 ("By the common law, justices of the peace had some criminal jurisdiction, but no jurisdiction whatever of suits between man and man . . .").

Third, we are told:

> Moreover, to the extent that State practices differed, or that some jury trial proposals were more encompassing than others, the normal course of political compromise suggests that Congressmen would have settled on the narrow common ground. This, of course, was all the more appropriate in writing a *constitutional* rule – which could always be expanded by subsequent legislation.
>
> Our conclusion is confirmed when we look at the membership of the select committee. Many were declared Federalists,[51] and all but one of the others[52] were supporters of the unamended Constitution.[53] And, even if any member had sought to widen the scope of the proposed amendments, it is sure that the committee as a whole, under the influence of Chairman Vining, Madison and Sherman – its only prominent men – would have rejected such an effort. . . .

Gov. Br. at 34-35.

Initially, we note that James Madison on the floor of the House rejected the notion that the rationale for the Federal Bill of Rights could in any way be limited by a "common ground" of the respective State Bills or Declarations of Rights (2 Schwartz 1031):

> It may be said, indeed it has been said, that a bill of rights is not necessary, because the establishment of this Government has not repealed those declarations of rights which are added to the several State constitutions; that those rights of the people, which had been established by the most solemn act, could not be annihilated by a subsequent act of that people, who meant, and declared at the head of the instrument, that they ordained and established a new system, for the express purpose of securing to themselves and posterity the liberties they had gained by an arduous conflict.

> I admit the force of this observation, but I do not look upon it to be conclusive. In the first place, it is too uncertain ground to leave this provision upon, if a provision is at all necessary to secure rights so important as many of those I have mentioned are conceived to be, by the public in general, as well as those in particular who opposed the adoption of this constitution. Besides, some States have no bills of rights, there are others provided with very defective ones, and there are others whose bills of rights are not only defective, but absolutely improper; instead of securing some in the full extent which republican principles would require, they limit them too much to agree with the common ideas of liberty.

More importantly, this final argument in support of the Government's "historical evidence" case reduces to the proposition that this Court should read the Bill of Rights generally as narrowly as possible because the Federalist political party was (in the Government's interpretation of the Federalist political motivation) anti-Bill of Rights. It is important to recognize that there is no principled basis (in terms of this Federalist political motivation argument) for differentiating the Seventh Amendment from the rest of the Bill of Rights.[14]

In *Boyd v. United States*, 116 U.S. 616 (1885), this Court responded to the Government's argument that

[14]Thus the Government observes at another point (Gov. Br. 27) respecting the debates at the Constitutional Convention over amending Article III to include a civil jury right that the "prevailing mood of the delegates [is shown by the fact that] every State without exception reject[ed] a civil jury trial Amendment to Article III." But the States also unanimously rejected Colonel Mason's motion for a committee to prepare *any* Bill of Rights for the Constitution. 2 M. Farrand, Records of the Federal Convention, 587-88 (1911).

the penalty and forfeiture statute there under consideration should be exempted from the Fifth Amendment and Fourth Amendment as not within the literal terms of those provisions:

> It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely: by silent approaches and slight deviation from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizens, and against any stealthy encroachments thereon. Their motto should be *obsta principiis*. . . .

Id. at 635.

That canon of construction recognizes that the Bill of Rights is "aimed predominantly at restraining the Government as an instrument of the popular will." *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 404 (1971) (Harlan J. concurring). Such a restraint depends ultimately on the spirit of interpretation which this Court (and the independent Federal Judiciary generally) applies to these "vague generalities." (*Cf.* Gov. Br. at 21). But James Madison said it best in explaining the Bill of Rights to the House (1 Schwartz 1031):

> It has been said, that it is unnecessary to load the constitution with this provision, because it was not found effectual in the constitution of the particular States. It is true, there are a few particular States in which some of the most valuable articles have not, at one time or other, been violated; but

> it does not follow but they may have, to a certain degree, a salutary effect against the abuse of power. If they are incorporated into the constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally lead to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights. . .

When all is said and done, we doubt that the Government has been able to explain away the deletion of the critical verbalism on whose alleged plain meaning the Government ha pitched its novel claim. *Cf. Apodaca v. Oregon*, 406 U.S. 404, 410 (1972) ("Surely one fact that is absolutely clear from this history is that after a proposal had been made to specify precisely which of the common-law requisites of the jury were to be preserved by the Constitution, the Framers explicitly rejected the proposal and instead left such specification to the future.").

In fact, if the Government's critical verbalism were thought to have the meaning the Government ascribes to it, the deletion of this phrase would have to cut strongly against the Government's position in these cases. This would be especially so in the case of the draftsman for the Federal Bill of Rights, since one of the principal arguments being made against any Bill of Rights was that a failure to enumerate a particular right would be taken as an abolition of that right. As Madison explained on the floor of the House in presenting his original draft (2 Schwartz 1031):

> It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow, by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure. This is one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system; but, I conceive, that it may be guarded against. I have attempted it, as gentlemen may see by turning to the last clause of the Fourth Resolution.

The clause in Madison's original draft that he referred to here reads (2 Schwartz 1027):

> The exceptions here or elsewhere in the constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people, or as to enlarge the powers delegated by the Constitution; but either as actual limitations of such powers, or as inserted merely for greater caution.

It is unlikely that this lawyer would have stricken a phrase thought to carry a "plain meaning" limitation on a general class described by the legislative language as within the protected zone of rights, on an assumption that future courts or lawyers would treat the deletion as stylistic. Nor do we think persuasive the Government's explanation that "the committee completed its work very rapidly, in a single week" (Gov. Br. at 33, footnote omitted).

C. The First Judiciary Act

Finally, the Government challenges our reliance on the provision for jury trial in section nine of the First Judiciary Act for "all suits for penalties and forfeitures incurred, under the laws of the United States. . . ." *See* Irey Main Br. 22-25; Gov. Br. at 44-50.

But the Government's discussion of the First Judiciary Act appears only to confirm the canon of construction respecting that Act's relationship to the Seventh Amendment repeatedly enunciated by this Court – *i.e.*, that the Judiciary Act must be taken as important evidence of its true meaning. *See* the cases cited at Irey Main Br. 22; *see generally Myers v. United States*, 272 U.S. 52, 174-75 (1926).

Thus, the Government's primary argument in this Court is not that penalty and forfeiture cases are somehow to be distinguished from among the general run of government litigation, but rather that all suits in which the government is a party would have been presumed – on the basis of the linguistic inference of the deleted "man and man" phrase – to be outside the category of "suits at common law" within the meaning of the Seventh Amendment. That argument, we submit, cannot stand – as an explanation of the linguistic frames of reference which governed the authors of both the Seventh Amendment and the Judiciary Act[15] – in the face of the inclusion within section nine of the Judiciary Act of "all suits at common law where the United States sues. . . ."

The Government attempts to deal with this considerable embarrasment to its theory by citing this Court's decision in 1876 in *Kohl v. United States*, 91 U.S. 367, which states that eminent domain proceedings could be considered "suits at commcn law" under the jurisdictional provision in Section 11 of the Act which encompasses "all suits of a civil nature at common law or in equity. . ." But our point is not that every time the phrase "suits at common law" appears in the Judiciary Act, it follows that the Constitution requires a jury. Rather, our contention is that with respect to the

[15]On the relationship between the Bill of Rights and the First Judiciary Act, *see* Warren, "*New Light on the History of the Federal Judiciary Act of 1787*," 37 Harv. L. Rev. 49 (1923).

substantive categories of cases understood on the basis of contemporary jury practices to be preserved by the general category "suits at common law," the actions of the authors of the First Judiciary Act in setting the parameters of the jury right must have taken as significant historical evidence. Where contemporary English and American practice clearly demonstrated there would be no jury trial for a given category of cases, presumably the authors of both the Seventh Amendment and the First Judiciary Act would anticipate that construction of these enactments,[16] and would not intend a jurisdictional provision, standing alone, to be dispositive.[17]

Finally, with respect to the Judiciary Act's expansion of federal jurisdiction beyond admiralty to encompass "all seizures on land" (ninth section, Judiciary Act) see Mr. Smith's comments on the floor of the House at 1 Annals of Cong. 828-30, and particularly his observation at 1 Annals of Cong. 829 that (emphasis added):

[16]It is interesting to note the reference to contemporary jurisdictional practices in the Court of Exchequer in England during the course of the debates regarding the First Judiciary Act. 1 Annals of Cong. 846.

We do not find at 1 Annals of Cong. 808, the passage apparently referred to by the Government at Gov. Br. 46, n. 77. Nor do we think the discussion at 1 Annals of Cong. 838-39, wherein it was apparently being maintained incorrectly that state courts could not constitutionally be given power to decide federal questions based on Federal Statutes, offers the Government much support.

[17]Thus the exemption of eminent domain suits from the Seventh Amendment category of "suits at common law" has been rested by this Court on

> the practice in this country and in England to ascertain by commissioners, special tribunals, and other like agencies, the compensation to be made to owners of private property taken for public use, and it was not to be supposed that the general provision in American Constitutions, national and state, preserving the right of trial by jury, superseded that practice.

Chicago, B. & Q. R. Co. v. Chicago, 166 U.S. 226, 245 (1897).

There can be no reason why our constituents should be displeased with the arrangement; the district judge will be elected from among the citizens of the State where he is to exercise his functions, and will feel every inducement to promote the happiness and protect the liberties of his fellow-citizens. He will be more independent than the State judges, holding his commission during good behavior, and not influenced by the fear of a diminution of his salary. *Trial by jury will be secured in all cases wherein it is provided in the State courts.* Should the district judge be under any bias, it is reasonable to suppose it would be rather in favor of his fellow-citizens, than in favor of foreigners, or the United States. . . .

II.

AN OSHA NON-JURY ADMINISTRATIVE PENALTY ADJUDICATION IS NOT SUSTAINABLE UNDER THE GOVERNMENT'S "ARTICLE I PLENARY POWER PUBLIC RIGHTS" THEORY.

A. The Government's "Public Rights" Theory Inescapably Encompasses the Federal Judiciary's Entire Article III Federal Question Jurisdiction, Both as a Matter of Original and Appellate Jurisdiction.

The Government contends that under Article III and the Seventh Amendment Congress is free to assign a "controversy" (Gov. Br. at 62) to "an administrative forum for the resolution of factual disputes" (*id.*) without jury participation at any stage as long as

> the subject matter is one with respect to which the legislature has plenary constitutional power.

(*Id.*) This "plenary constitutional power" concept is in turn defined by the Government as encompassing any area of regulatory power delegated to the Congress under Article I of the Constitution (*id.*).[18] And this theory cannot – as the Government acknowledges – be limited to circumstances where Congress chooses a government agency, rather than a private individual, to enforce its "plenary" regulatory power. *Id.* at 62-63.

Thus the Government's "plenary power" test for the permissible limits of congressional discretion to delegate a case or controversy to a non-jury administrative adjudicator necessarily reaches, *inter alia,*

> all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . . .

to which Article III, Section 2 extends the judicial power of the United States.

Moreover, at least within the Federal Question category of cases, the "plenary power" test necessarily embraces the whole of the Federal Judiciary's "appellate jurisdiction both as to Law and Fact," to which Article III of the Constitution extends the Judicial Power "with such Exceptions, and under such Regulations as the Congress shall make." *Id.* Thus, it cannot be contended that there is an independent due process right under the Fifth Amendment to appellate review by an Article III federal court at least as to questions of "law" posed on an administrative record (as opposed to "factual disputes"). *See Palmore v. United States,* 411 U.S. 389, 410 (1973).

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[18]The Occupational Safety and Health Act rests only on Congress' power to regulate interstate commerce under Article I, Section 8. *See* OSHA §2(b), 29 U.S.C. §651. Hence the inescapable breadth of the Government's "plenary power" theory.

This "plenary power test"[19] – even within its acknowledged minimal analytical contours – entails so deep an erosion of the fundamental Article III federal judicial check on abuses of Congressional and/or Executive Power as to warrant the closest scrutiny of the precedents and authorities advanced by the Government in support of the theory. Yet a reading of those precedents reveals that, for the most part, the authorities cited by the Government affirmatively compel rejection of the "Article I – plenary power – public rights" argument for bypassing Article III and the Seventh Amendment when Congress tries to go beyond those special subject matter areas where Article I (or some Constitutional doctrine) effectively gives the legislative branch of the nation's Government exclusive and complete regulatory power. Specifically, this Court has never sustained a congressional delegation of Article III cases or controversies to a non-Article III tribunal where the congressional regulatory power rested only on the commerce clause.

B. This Court's Cases Defining the "Plenary Power" and "Public Rights" Concepts Expressly Limit Those Doctrines to Subject Matter Areas Where Congress Has Exclusive and Complete Regulatory Authority.

1. Introduction

The Government extracts its "Article I – plenary power – public rights" theory from three sources: (a) cases defining Congress' regulatory power predominantly in the subject matter areas of taxation and admission

[19]In the ensuing discussion, we shall at times use the shorthand "Article I–plenary power–public rights" to state our understanding of the Government's theory.

of aliens; (b) cases defining Congress' regulatory power over "legislative courts" predominantly in the territories and the District of Columbia; and (c) this Court's decision in *Crowell v. Benson*, 285 U.S. 22 (1932).

2. The Taxation and Alien Immigration Cases

The Government derives its "public rights" concept initially from the sentence in which this phrase is used in the following paragraph of the decision of this Court in *Murray's Lessee v. Hoboken Land Co.*, 59 U.S. (18 How.) 272, 284 (1856):

> To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider Congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power, a matter which, from its nature, is not a subject for judicial determination. At the same time there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which Congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper. Equitable claims to land by the inhabitants of ceded territories form a striking instance of such a class of cases; and as it depends upon the will of Congress whether a remedy in the courts shall be allowed at all, in such cases they may regulate it and prescribe such rules of determination as they may think just and needful. Thus it has been repeatedly decided in this class of cases, that upon their trial, the acts of executive officers, done under the authority of Congress, were conclusive, either upon particular facts involved in the inquiry or upon the whole title.

Foley v. Harrison, 15 How. 433; *Burgess v. Gray*, 16 How. 48.

See Gov. Br. at 67. In this passage, the *Murray* Court did not simply launch a slogan to wreak what havoc it might on the scheme of the Constitution some one hundred and twenty years later. Rather, the Court, in order "[t]o avoid misconstruction upon so grave a subject . . .", spelled out in the terminology common to both Article III and the Seventh Amendment (*i.e.*, "suit[s] at the common law, or in equity, or admiralty;" *cf. Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 436 (1830)) the limits as well as the reach of the "public rights" concept. Thus, Congress cannot "withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at common law," the precise category covering governmental proceedings either against the person or thing, for penalties or forfeitures. *See* pp. 6-7, *supra*. Moreover, to make absolutely certain the opinion would not be misconstrued on so grave a matter, the *Murray* Court, in the same definitional paragraph, tenders a discussion of the Court's cases dealing with titles to land ceded by the government as illustrative of the "public rights" category, in which "it depends upon the will of Congress whether a remedy in the courts shall be allowed at all . . . ."[20]

The entire content of the *Murray* opinion underlines this construction of the "public rights" phrase as used in *Murray*. Thus, the facts in *Murray* involved summary seizure by distress warrant of the property of a Customs Collector in default in his accounts to the Treasury. The congressional statute authorizing sum-

[20] *See also Foley v. Harrison*, 56 U.S. (15 How.) 433, 448 (1853); *Burgess v. Gray*, 57 U.S. (16 How.) 48, 65 (1853).

mary collection was challenged on both Article III and Fifth Amendment due process grounds. The Court treated the two constitutional objections together as raising

> the questions, whether, under the Constitution of the United States, a Collector of the Customs, from whom a balance of account has been found to be due by accounting officers of the Treasury, designated for that purpose by law, can be deprived of his liberty or property, in order to enforce payment of that balance, without the exercise of the judicial power of the United States, and yet by due process of law, within the meaning of those terms in the Constitution; and if so, then, second, whether the warrant in question was such due process of law.

Id., 59 U.S. (18 How.) at 275-76. To justify its conclusion that summary tax process may be "due process," even while bypassing the courts altogether, the Court presented an extended historical analysis of American and English practice respecting tax collection procedures, including the following:

> It is true that in England all these proceedings were had in what is denominated the Court of Exchequer, in which Lord Coke says, 4 Inst. 115, the barons are the sovereign auditors of the kingdom. *But the barons exercise in person no judicial power in auditing accounts, and it is necessary to remember that the exchequer includes two distinct organizations, one of which has charge of the revenues of the Crown, and the other has long been in fact, and now is, for all purposes, one of the judicial courts of the kingdom, whose proceedings are and have been as distinct in most respects, from those of the revenue side of the exchequer, as the proceedings of the Circuit Court of this district are from those of the Treasury;* and it would be an unwarrantable assumption to

> conclude that, because the accounts of receivers of revenue were settled in what was denominated the Court of Exchequer, they were judicial controversies between the King and his subjects, *according to the ordinary course of the common law or equity. The fact, as we have already seen, was otherwise.*

Id., 59 U.S. (18 How.) at 281-82 (emphasis added).

It was precisely on the "judicial" side of the Court of Exchequer where a civil governmental suit for a monetary penalty for violation of a statute would have been brought, strictly as a common law action with a right to trial by jury. *See generally* Irey Main Br. 36-37; *Damsky v. Zavatt*, 289 F.2d 46, 49-50 (2d Cir. 1961). Summary process for collection of taxes due fell on the "revenue side of the exchequer" – whose "functioning has been likened to that of 'an administrative tribunal.'" *Damsky v. Zavatt, supra*, 289 F.2d at 49 *quoting from* 1 F. Pollock & F. Maitland, *The History of English Law*, 192 (2d ed. 1889).

The category of "public rights" then, as carefully delineated by the Court in *Murray*, in essence encompassed those subject matters as to which Congress' regulatory power was so complete that availability of virtually *any* judicial remedy was dependent in the first instance on the Congress' consent to allow any suit at all. *Id.*, 59 U.S. (18 How.) at 284. That delineation of the "public rights" concept as the analytical "line" setting the limits of Congressional power to bypass Article III and the Seventh Amendment meshes with this Court's rationale for holding that suits to enforce claims against the Sovereign are not in the nature of common law suits for Seventh Amendment purposes. *See McElrath v. United States*, 102 U.S. 426, 439-40 (1880). *See also* Irey Main Br. 52-53.

And the same understanding of this "public rights" limitation on the subject matters with respect to which

Congress may totally bypass the judicial power is emphasized in practically every line of the Court's opinion in *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 339-40 (1909). Indeed, the *Oceanic* Court, in its analysis of Congress' unique "plenary" power in these subject matter areas, expressly refers to the difference between these powers and the regulatory power Congress exercises when it acts exclusively under the Interstate Commerce Clause (214 U.S. at 334, emphasis added):

> Resting, as the statute does, *upon the authority of Congress over foreign commerce* and its right to control the coming in of aliens into the United States, and *to regulate that subject in the fullest degree*, reserving for future consideration the particular contentions advanced at bar by the plaintiff in error, it may not be doubted that it is not open to discussion that the statute, as thus construed, was within the power of Congress to enact. In Buttfield v. Stranahan, 192 U.S. 470, 48 L. ed. 525, 24 Sup. Ct. Rep. 349, considering the subject, it was said (pp. 492, 493):
>
> "*Whatever difference of opinion, if any, may have existed or does exist concerning the limitations of the power resulting from other provisions of the Constitution, so far as interstate commerce is concerned, it is not to be doubted that from the beginning Congress has exercised a plenary power in respect to the exclusion of merchandise brought from foreign countries*; not alone directly, by the enactment of embargo statutes, but indirectly, as a necessary result of provisions contained in tariff legislation. It has also, in other tariff legislation, exerted a police power over foreign commerce by provisions which, in and of themselves, amounted to the assertion of the right to exclude merchandise at discretion."
>
> . . . .

The *Murray* and *Oceanic* cases together, then, carefully limit the "public rights" and "plenary power"

concepts – as to those concepts relate to Article III and the Seventh Amendment – to those subject matters where Congressional regulatory power is complete and exclusive. That same limitation is repeatedly expressed in all the other immigration and tax cases cited by the Government in support of its theory. *See Lloyd Sabaudo Societa v. Elting*, 287 U.S. 329, 334 (1932);[21] *Helvering v. Mitchell*, 303 U.S. 391, 399 (1938); *Wickwire v. Reinecke*, 275 U.S. 101, 105-06 (1927) *citing, inter alia, Nicholls v. United States*, 74 U.S. (7 Wall.) 122, 127 (1869) and *Cheatham v. United States*, 92 U.S. 85, 88-89 (1876). *See also Phillips v. Commissioner*, 283 U.S. 589, 595 & n. 5 (1931).[22]

This Court's more recent cases amply demonstrate that special rules of constitutional jurispurdence operate in the areas of Congressional power over aliens and taxation. *See Kleindienst v. Mandel*, 408 U.S. 753, 765-66 (1972), (*citing, inter alia, Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909)); *U.S. v. Ortiz*, 43 U.S.L.W. 5026, 5032 (June 30, 1975); *Almeida-Sanchez v. United States*, 413 U.S. 266, 272 (1973); *id.*, 413 U.S. at 279 (Powell, J., concurring); *Lynch v. Household Finance Corp.* 405 U.S. 538, 542-43, n. 6 (1972). *See also Perez v. Ledesma*, 401 U.S. 82, 126-27 (1971) (Brennan, J., concurring), and particularly Justice Brennan's treatment at footnote 17 of *Phillips v. Commissioner, supra.*

[21] The *Sabaudo* case also expresses the collateral development of a Fifth Amendment due process check on Congressional powers even within these zones of extraordinary plenary power. *See id.*, 287 U.S. at 335-36 limiting language seemingly to the contrary in the *Oceanic* case, *supra*, 214 U.S. at 342. *See also Phillips v. Commissioner*, 283 U.S. 589 (1931).

[22] In *Phillips v. Commissioner*, 283 U.S. 589, 595 & note 5 (1931) the Court relied, *inter alia*, on *Cheatham v. United States*, 42 U.S. 85, 89 (1876) and "the ancient English practice of summary seizure of the property of a crown debtor" (*see* 283 U.S. 595, n. 5) to support its view that "the right of the United States to collet its internal revenue by summary administrative proceedings has long been settled." Also in *Phillips*, the Court rested the *Murray* rationale squarely on "the need of the government promptly to secure its revenues." *Id.*, 283 U.S. at 596.

In sum, this Court has consistently taken extraordinary care to spell out the limitations as well as the reach of the "public rights" and "plenary power" phrases as they occur in the context of Congressional regulatory power in these unique areas. For the Government now to urge that these cases be treated as a basis for a "plenary power – public rights" equation necessarily encompassing the whole of the Congressional regulatory power under Article I of the Constitution is to urge upon this Court the precise "misconstruction upon so grave a subject" that the Court in *Murray* cautioned against.

3. The "Legislative Court" Cases

Much the same point can be made respecting the Government's use of the "legislative court" line of cases in support of its "Article I – plenary power – public rights" theory. In these cases, this Court has articulated two relevant separate principles, each in turn expressly confined to the special circumstances of Congressional power under the Constitution which call the principles into play. Within the confines of certain geographic areas over which the Constitution accords Congress "plenary" regulatory powers similar to those of state government, the Congress may create non-Article III tribunals and bestow upon them the power to decide all Article III "cases or controversies" [the "Territorial Plenary Power Principle"]. Beyond those geographic zones, Congress' power to bypass Article III tribunals is confined strictly to those subject matters over which Congress has complete and exclusive regulatory power [the "Subject Matter Plenary Power Principle"].

a. *The Territorial Plenary Power Principle* – Thus, in *American Insurance Co. v. Canter*, 26 U.S. (1 Pet.) 511, 546 (1828) (Marshall, J.), the Court, in the course of holding that Congress may vest admiralty jurisdiction in a territorial court not conforming to the requirements of Article III, explicitly relies on the special nature of Congress' regulatory powers respecting the territories, *and explicitly rejects extension of that Congressional power to non-Article III tribunals in the states* (emphasis added):

> *Although admiralty jurisdiction can be exercised in the States in those courts only which are established in pursuance of the 3d article of the Constitution, the same limitation does not extend to the territories.* In legislating for them, Congress exercises the combined powers of the general and of a State government.

And since *Canter*, this Court has carefully tied the special powers of Congress over legislative courts in the territories and the District of Columbia to the unique powers of general sovereignty which the Constitution accords the Congress in these geographical areas.[23] Thus, in *McAllister v. United States*, 141 U.S. 175, 187-88 (1891), the Court, in rejecting the claim of a District Judge for the territory of Alaska that he could not be removed from office during his appointed term, observed (emphasis added):

> The absence from the Constitution of such guaranties [of Article III judicial independence]

[23]The Constitution gives Congress the power

> "to exercise exclusive Legislation in all Cases whatsoever, over [the District of Columbia]. . . ."

Art. I, Sec. 8, Clause 17. Similarly, Article IV, Section 3 provides as follows:

> "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States. . . ."

> for territorial judges was *no doubt due to the fact that the organization of governments for the Territories was but temporary, and would be superseded when the Territories became States of the Union. The whole subject of the organization of territoral courts, the tenure by which the judges of such courts shall hold their offices, the salary they receive, and the manner in which they may be removed or suspended from office, was left by the Constitution, with Congress under its plenary power over the Territories of the United States.* How far the exercise of that power is restrained by the essential principles upon which our system of government rests, and which are embodied in the Constitution, we need not stop to inquire; though we may repeat what was said in *Late Corporation of Church of Christ of Latter Day Saints v. United States*, 136 U.S. 1, 44 [34: 481, 491]: "Doubtless Congress, in legislating for the Territories, *would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments;* but these limitations would exist rather by inference, and the general spirit of the Constitution from which Congress derives all its powers, than by any express and direct application of its provisions."

In fact, one of those very constitutional limitations "in favor of personal rights which are formulated in the Constitution and its Amendments" which has been applied even within these unique territorial zones of "plenary power" is the Seventh Amendment. *See Pernell v. Southall Realty*, 416 U.S. 363 (1974) (District of Columbia); *Capital Traction Co. v. Hof*, 174 U.S. 1 (1899) (District of Columbia); *Webster v. Reid*, 52 U.S. (11 How.) 437, 460 (1837) (Territory of

Iowa); *Kennon v. Gilmer*, 131 U.S. 22, 28 (1889) (Territory of Montana).[24]

And in *Palmore v. United States*, 411 U.S. 389, 397-98 (1973) the Court – at the threshold of its analysis of the question whether within the District of Columbia Congress could delegate an Article III-type Federal Question case to a non-Article III tribunnal – expressly distinguishes between the "plenary power" of Congress under Article I, Section 8, Clause 17 (see note 23, *supra*) and the "other powers delegated to [Congress] under Article I, §8" (emphasis added):

> Art. I, §8, cl. 17, of the Constitution provides that Congress shall have power "[t]o exercise exclusive Legislation in all Cases whatsoever, over" the District of Columbia. *The power is plenary.* Not only may statutes of Congress of otherwise nationwide application be applied to the District of Columbia, but Congress may also exercise all the police and regulatory powers which a state legislature or municipal government would have in legislating for state or local purposes. Congress "may exercise within the District all legislative powers that the legislature of a State might exercise within the State; and may vest and distribute the judicial authority in and among courts and magistrates, and regulate judicial proceedings before them, as it may think fit, so long as it does not contravene any provision of the Constitution of the United States." *Capital Traction Co. v. Hof*, 174 U.S. 1, 5 (1899). This has been the characteristic view in this Court of congressional powers with respect to the District. *It is apparent that the power of Congress under Clause 17 permits it to legislate for the District in a manner with respect to subjects that would exceed its powers, or at least would be very unusual, in the context of national legislation enacted under other powers delegated to it under Art. 1, §8.* See *Gibbons v. District of Columbia*, 1 U.S. 404, 408 (1886)."

Then the *Palmore* Court holds that, *within those geographic zones encompassed by the constitutional grants to Congress of plenary power*, Congress may delegate a federal question case within the meaning of Article III to a non-Article III tribunal. 411 U.S. at 400-404. Finally, lest the holding be subject to misconstruction, the Court again reiterates the *limitation* as well as the *extent* of the "plenary power" thus recognized (411 U.S. at 407-08, emphasis added):

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[24]The Government tenders the following sentence in an apparent attempt to avoid this unfortunate embarrassment to its reliance on this line of cases:

> "This is not to say that Congress cannot decide, *either by express statutory command or pertinent silence*, that a particular adjudicator should afford a jury trial. *See, e.g., Webster v. Reid*, 11 How. 437; *Pernell v. Southall Realty, supra*, 416 U.S. at 365-366, 374-75, 383. *C.F. Glidden & Co. v. Zdanok, supra*, 370 U.S. at 549-551."

Gov. Br. 80-81 (emphasis added). But *Pernell's* application of the Seventh Amendment to the Superior Court of the District of Columbia in no sense rests on "Congressional decision" by either "express statutory command" or "pertinent silence". Rather, the Court expressly held that it was foreclosed from reliance on statutory construction as an alternative source for the jury right because of the controlling decision of the District of Columbia Court of Appeals that Congress *had repealed* the potential statutory basis for the jury right. *Pernell, supra*, 416 U.S. at 366. The Court then went on to place its disposition squarely on the Seventh Amendment (416 U.S. at 363), observing that "like other provisions of the Bill of Rights, it is fully applicable to courts established by Congress in the District of Columbia." *See Capital Traction Co. v. Hof*, 174 U.S. 1, 5 (1894). *See also Pernell, supra*, 416 U.S. at 370. If the Government's attribution of the result in *Pernell* to "pertinent" Congressional "silence" were accurate, presumably Congress could simply reverse the holding in *Pernell* with appropriate legislation for the Superior Court of the District of Columbia.

Respecting the doctrinal source of the jury right in the territories, *see Rasmussen v. United States*, 197 U.S. 516, 526-528 (1905).

It is apparent that neither this Court nor Congress has read the Constitution as requiring every federal question arising under the federal law, or even every criminal prosecution for violating an Act of Congress, to be tried in an Art. III court before a judge enjoying lifetime tenure and protection against salary reduction. *Rather, both Congress and this Court have recognized that state courts are appropriate forums in which federal questions and federal crimes may at times be tried; and that the requirements of Art. III, which are applicable where laws of national applicability and affairs of national concern are at stake, must in proper circumstances give way to accommodate plenary grants of power to Congress to legislate with respect to specialized areas having particularized needs and warranting distinctive treatment.* Here, Congress reorganized the court system in the District of Columbia and established one set of courts in the District with Art. III characteristics and devoted to matters of national concern. It also created a wholly separate court system designed primarily to concern itself with local law and to serve as a local court system for a large metropolitan area.

b. *The Subject Matter Plenary Power Principle* -- In *Ex parte Bakelite Corp.*, 279 U.S. 438 (1929), this Court again emphasized Congress' exclusive plenary power over such subject matters as claims against the Government (as opposed to Congress' general regulatory powers). Thus, after tendering the consular courts established in foreign countries as an illustration of Congress' powers to establish legislative courts pursuant to its exclusive powers respecting treaties and foreign commerce, (279 U.S. at 451), the *Bakelite* Court goes on to emphasize the totality of Congressional regulatory power with respect to these subject matters delegable by Congress to "legislative courts" (*id.*, 279 U.S. at 451-52; emphasis added):

> Legislative courts also may be created *as special tribunals* to examine and determine various matters, arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it. *The mode of determining matters of this class is completely within congressional control. Congress may reserve to itself the power to decide, may delegate that power to executive officers, or may commit it to judicial tribunals.*
>
> *Conspicuous among such matters are claims against the United States.* These may arise in many ways and may be for money, lands, or other things. They all admit of legislative or executive determination and yet from their nature are susceptible of determination by courts; but no court can have cognizance of them except as Congress makes specific provision therefor. Nor do claimants have any right to sue on them unless Congress consents; and Congress may attach to its consent such conditions as it deems proper, even to requiring that the suits be brought in a legislative court specially created to consider them.

Also noteworthy is the *Bakelite* Court's discussion of the Court of Private Land Claims as a further illustration of Congress' special power respecting these subject matters. *Id.*, 279 U.S. at 456; compare the *Murray* case, *supra*, 59 U.S. (18 How.) at 284; see p. 38, *supra*.

Thus the *Canter – Bakelite* series of cases, like the *Murray – Oceanic – Helvering* series, confines Congress' power to bypass Article III outside the constitutionally specified geographic zones to those subject matters as to which the Congress has complete and exclusive regulatory power. The paradigm repeatedly offered as illustrative of these subject matters is claims against the United States, be they for money or land. *See McElrath v. United States, supra,* discussed in *Ex parte Bakelite*

Corp., supra, 279 U.S. at 453-54. Compare *NLRB v. Jones & Laughlin*, 301 U.S. 1, 48-49 (1937) relying on *Guthrie National Bank v. Guthrie*, 173 U.S. 528, 537 (1899). See generally Irey Main Br. at 49-51. These cases, far from supporting the Government's "Article I – plenary power – public rights" theory, compel rejection of that theory, a proposition further demonstrated by the simple fact that the Government is not able to provide a single precedent in which this Court has ever held Congress may delegate Article III cases or controversies arising under the Commerce Clause to a non-Article III federal tribunal. The one remaining case offered by the Government in support of its theory is *Crowell v. Benson*, 285 U.S. 22 (1932).

4. The Crowell Case

Crowell v. Benson, 285 U.S. 22 (1932), was an injunction action brought by an employer against the Deputy Commissioner of the United States Employees' Compensation Commission challenging an award of compensation under the Longshoreman's and Harbor Worker's Compensation Act on the grounds that the award was contrary to law because the employee was not employed at the time of the accident. 285 U.S. at 36-37. By amended complaint, the constitutionality of the statute was challenged on three grounds: [1] the Due Process Clause of the Fifth Amendment; [2] The Seventh Amendment; and [3] "the provisions of article 3 with respect to the judicial power of the United States." *Id.*, 285 U.S. at 37. The U.S. District Judge denied a motion to dismiss "and granted a hearing de novo upon the facts and the law, expressing the opinion that the act would be invalid if not construed to permit

such a hearing." *Id.* The employer won on the issue of employment and on appeal the Circuit Court of Appeals affirmed. *Id.* The majority decision (per Chief Justice Hughes) first breaks the issues thus posed into questions of "substantive rights" and questions of "procedural requirements." *Id.* Under the heading of "substantive rights," the Court, noting Congress' "exclusive authority" with respect to maritime law (*id.* at 39), holds that the Fifth Amendment Due Process Clause is not violated by a statute abolishing the employer's substantive liability for damages and creating a non-fault remedy. *Id.*, 285 U.S. at 39-42.[25]

Then under the heading of "procedural requirements," the *Crowell* Court first disposes of the Seventh Amendment contention as follows (*id.*, 285 U.S. at 45):

> As the claims which are subject to the provisions of the act are governed by the maritime law as established by the Congress and are within the admiralty jurisdiction, the objection raised by the respondent's pleading as to the right to a trial by jury under the Seventh Amendment is unavailing (*Waring v. Clarke*, . . .) and that under the Fourth Amendment is neither explained nor urged. The other objections as to procedure invoke the due process clause and the provision as to the judicial power of the United States.

Then the Court holds that *under the due process clause*, the act constitutionally commits questions of fact (other than cases involving constitutional rights) to the final determination of the administrator as long as, *inter*

[25]The *Crowell* opinion on this substantive due process ruling compares Congress' powers to those of the states in enacting the Workman's Compensation laws under the Due Process Clause of the Fourteenth Amendment, citing by way of support, *inter alia*, this Court's opinion in *Mountain Timber Co. v. Washington*, 243 U.S. 219 (1917). *See Crowell, supra*, 285 U.S. at 41-42. See the discussion of the *Mountain Timber* case at Irey Main Br. 69-70, n. 32.

alia, the findings are based on the evidence. *Id.*, 285 U.S. 46-48.

Next, the *Crowell* majority reviews the Article III contention (285 U.S. at 48-65), upholding the statute on its statutory interpretation – deemed compelled by Article III to avoid unconstitutionality – that a de novo factual review of jurisdictional issues was compelled to preserve the Article III independent judicial power of the United States and "the fundamental rights" dependent thereon (285 U.S. 56-57; emphasis added):

> In relation to these basic facts, the question is not the ordinary one as to the propriety of provision for administrative determinations. *Nor have we simply the question of due process in relation to notice and hearing. It is rather a question of the appropriate maintenance of the federal judicial power in requiring the observance of constitutional restrictions.* It is the question whether the Congress may substitute for constitutional courts, in which the judicial power of the United States is vested, an administrative agency – in this instance a single deputy commissioner – for the final determination of the existence of the facts upon which the enforcement of the constitutional rights of the citizen depend. The recognition of the utility and convenience of administrative agencies for the investigation and finding of facts within their proper province, and the support of their authorized action, does not require the conclusion that there is no limitation of their use, and that the Congress could completely oust the courts of all determinations of fact by vesting the authority to make them with finality in its own instrumentalities or in the executive department. *That would be to sap the judicial power as it exists under the Federal Constitution, and to establish a government of a bureaucratic character alien to our system, wherever fundamental rights depend, as not infrequently they do depend, upon the facts, and finality as to facts becomes in effect finality in law.*

It is in the context of this holding that the *Crowell* majority tendered the dictum now relied upon so heavily by the Government in support of its "Article I–plenary power–public rights" theory (285 U.S. at 50-51; emphasis added):[26]

> *As to determinations of fact, the distinction is at once apparent between cases of private right and those which arise between the government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments.* The Court referred to this distinction in Murray's Lessee v. Hoboken Land & Improvement Company, supra, pointing out that "there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper." *Thus the Congress, in exercising the powers confided to it, may establish 'legislative' courts (as distinguished from 'constitutional courts in which the judicial power conferred by the Constitution can be deposited') which are to form part of the government of territories or of the District of Columbia,* or to serve as special tribunals "to examine and determine various matters, arising between the

[26]We note that just prior to this passage relied on by the Government, the *Crowell* opinion took care to repeat the *Murray* Court's statement that Congress cannot

> "Withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination."

285 U.S. at 49. The Court then notes that Congress left "to the Federal Court full authority" (285 U.S. at 50) to pass on all questions of law. *Id.* at 50.

government and others, which from their nature do not require judicial determination and yet are susceptible of it." But "the mode of determining matters of this class is completely within congressional control. Congress may reserve to itself the power to decide, may delegate that power to executive officers, or may commit it to judicial tribunals." Ex parte Bakelite Corporation, 279 U.S. 438, 451, 49 S.Ct. 411, 413, 73 L. Ed. 789. Familiar illustrations of administrative agencies created for the determination of such matters are found in connection with the exercise of the congressional power as to interstate and foreign commerce, taxation, immigration, the public lands, public health, the facilities of the post office, pensions, and payments to veterans.

The present case does not fall within the categories just described, but is one of private right, that is, of the liability of one individual to another under the law as defined. But, in cases of that sort, there is no requirement that, in order to maintain the essential attributes of the judicial power, all determinations of fact in constitutional courts shall be made by judges. *On the common-law side of the federal courts, the aid of juries is not only deemed appropriate but is required' by the Constitution itself.* In cases of equity and admiralty, it is historic practice to call to the assistance of the courts, without the consent of the parties, masters, and commissioners or assessors, to pass upon certain classes of questions, as, for example, to take and state an account or to find the amount of damages.

This passage in *Crowell* occurs in the context of a section of the Court's opinion where the fundamental holding is that the constitutional policy concerns underpinning Article III compel the conclusion that a *de novo* hearing in an Article III tribunal must be accorded for all "jurisdictional" facts if the statute is to

be constitutional. This holding, it is critical to note, applied with equal force as far as the *Crowell* majority was concerned to proceedings in which the Government was a litigant and proceedings only between private persons. *See id.*, 285 U.S. 22, 56-65. Moreover, under Chief Justice Hughes' analytical scheme, it is apparent that all questions of law had to be reserved to the Article III tribunal for disposition. See note 26 *supra.*

But this fundamental scheme, as laid out in *Crowell*, died aborning. Thus, the *Crowell* holding, with respect to the Article III requirements for *de novo* review of jurisdictional facts, "has no germinal significance." *See* H. M. Hart & H. Wechsler, *The Federal Courts and The Federal System*, 399 (2d ed., 1973) and sources cited therein at n. 14. Indeed, as Professors Hart and Wechsler point out (*id.*) Chief Justice Hughes himself soon contributed to the internment of this part of the *Crowell* formula in his decision in *St. Joseph Stockyards Co. v. United States*, 298 U.S. 38 (1936). And, as we have noted, *Crowell* itself separately holds that there is no Fifth Amendment due process requirement to *de novo* factual hearings as long as constitutional claims are not involved. Moreover, as we have noted, there is in fact no Fifth Amendment due process requirement whatsoever for participation by Article III tribunals in any phase of litigation. *See Palmore v. United States, supra,* 411 U.S. at 410.

Thus, stripped of the fundamental constraint of *Crowell's* holding on the *de novo* hearing point, the dictum respecting the "government litigant–private litigant" dichotomy,[27] in effect, becomes an engine for the

[27] As we discuss within, p. 56 *infra*, Chief Justice Hughes' "private rights–public rights" dichotomy in *Crowell does not* conform to the Government's Article I–plenary power–public rights theory; rather, the *Crowell* conception reflects a government litigant–private litigant distinction.

virtual demolition of the independent federal judicial power in all of the most important classes of cases. That, of course, explains why the dictum has had no germinal significance in the development of this Court's law in this area. Indeed, the Chief Justice himself, when confronting the Seventh Amendment issue in *NLRB v. Jones & Laughlin*, 301 U.S. 1, 48-49 (1937) makes no mention whatsoever of the *Crowell* case, and instead rests the disposition of the Seventh Amendment point on, *inter alia*, *Guthrie National Bank v. Guthrie*, 173 U.S. 528, 537 (1899).[28] The *Guthrie* case holds that a claim against the sovereign is not covered by the Seventh Amendment because it is not in the nature of a suit at common law. Thus did the Chief Justice return the basic analysis to the familiar paradigm which, from the *Murray* case on, has been used to confine the scope of Congressional discretion to bypass Article III and the Seventh Amendment to those special subject matters where Congress' regulatory power is truly "plenary". *See Palmore v. United States, supra,* 411 U.S. at 407-08.[29]

Moreover, the *Crowell* dictum on its own terms doesn't support the Government's "Article I–plenary power–public rights" theory. Thus, the Government offers the following view of this dictum (Gov. Br. at 73):

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[28]We present our view of *NLRB v. Jones & Laughlin, supra,* in our main brief at 46-65. We agree with the Government that it is significant that the *Jones & Laughlin* case was written by the author of the *Crowell* case. *See* Gov. Br. 74. However, the observation seems to cut against the government's interpretation of *Jones & Laughlin*, since the Chief Justice did not in any part rely on the *Crowell* case and instead relied quite heavily on the *Guthrie* decision. *See* Irey Main Brief, at 50-53.

Respecting the *Jones & Laughlin* case, we call the Court's attention to the equitable nature of a back pay award in a labor proceeding as "restitution" to the worker. *See Rogers* v. *Loether*, 467 F.2d 1110, 1121-22 (8th Cir., 1972) *aff'd sub nom. Curtis* v. *Loether, supra.*

[29]We also observe that, were this Court today "writing on a clean slate," *cf., Kliendienst* v. *Mandel, supra*, 408 U.S. at 766, it is

(continued)

> Significantly, while the opinion went on generally to sustain administrative factfinding even in this private-right sphere, it did so on the theory that the commission was an integral and immediate adjunct of Article III courts analogous to juries and masters, not an independent agency, 285 U.S. at 51-54. *See* Jaffe, *Judicial Control of Administrative Action* 88-89 (Abr. Ed., 1965). Implicit in this analysis is the assumption that where, and only where, exclusively Article III private (rather than Article I plenary public) rights are involved, the judicial institutions inherent in Article III–including a jury trial where mandated, 285 U.S. at 51–must be preserved.

This view is squarely contradicted by the very text of the passage relied upon. *First*, there is no way the *Crowell* opinion can be read as suggesting that the constitutional jury right automatically falls once the Article III barrier to a Congressional bypass of the Federal Judiciary in favor of an administrative tribunal is hurdled. Thus, as we have noted, the Seventh Amendment jury issue is expressly dealt with separately from the "distinct question" posed by "[t]he contention based upon the judicial power of the United States, as extended 'to all Cases of admiralty and maritime Jurisdiction' (Const. art. 3)." *Id.*, 285 U.S. at 48-49. More importantly, the *Crowell* dictum itself tenders, as an illustration of the cateogry of cases as to which Congress can bypass the Article III judicial power, the legislative court cases relating to the District of Columbia, concerning which this Court has repeatedly stated "the Seventh Amendment . . . [l]ike other provisions of the Bill of Rights . . . is fully applicable. *See*

(footnote continued from preceding page)
possible that cases such as *Oceanic* and *Sabaudo* would have been decided differently. We submit that even within zones of congressional plenary power, the discretion of Congress to bypass Article III should be restricted to those instances where, based on strict historical analysis, it can truly be said that the subject matter of the litigation is not in the nature of a common law suit. *See* the *Murray* case, *supra.*

Capital Traction Co. v. Hof, 174 U.S. 1, 5 (1899)." *Pernell v. Southall Realty, supra*, 416 U.S. at 370. *See generally* note 24, *supra*. There can be no doubt as to the *Crowell* majority's cognizance of this principle, given the quotations from and reliance upon the *Capital Traction Co.* case by the *Crowell* majority in support of its holding on the Article III issue. *Id.*, 285 U.S. at 61.

Second, this *Crowell* passage, in any event, certainly offers no "implicit" support for the Government's "Article I–plenary power–public rights" theory. Thus, the Government expressly acknowledges that the logic of its theory *cannot* turn on the identity of the litigant enforcing the "public right" as a governmental agent as opposed to a private person (*id.* at 62-63). That conception of "public rights" is most certainly *not* the conception articulated in this passage from the *Crowell* opinion. Thus, the *Crowell* majority distinguishes "between cases of private right and those which arise between the government and persons subject to its authority in connection with the performance of the constitutional function of the executive or legislative branches." *Id.* at 50. The *Crowell* case, then, is using the "public–private" dichotomy precisely in the sense the Government expressly eschews it, a proposition confirmed by Crowell's treatment of this Longshoreman's Workman's Compensation case as a "private right" case analogous for Fifth Amendment substantive due process purposes to the state Workman's Compensation cases and specifically the *Mountain Timber* case. *See* note 25, *supra*. *See also* Justice Brandeis' dissent in *Crowell*, 285 U.S. at 87-88, n. 54. Compare Gov. Br. at 63.

III.

AN OSHA NON-JURY PENALTY ADJUDICATION CANNOT BE SUSTAINED UNDER THE RATIONALE OF KATCHEN V. LANDY.

The Government offers one last contention after their principle arguments (Gov. Br. at 19):

> 3. Finally (pp. 81-88, *infra*), invoking *Katchen v. Landy*, 382 U.S. 323, we suggest that the agency created to adjudicate these cases is like a specialized statutory court of equity which can exercise summary jurisdiction over otherwise jury-triable issues if the interposition of a jury would dismember the statutory scheme. That analogy is justified, we say, because the Review Commission's primary task is to grant or deny permanent injunctive relief respecting alleged safety and health violations endangering workers, to which the discretionary power to impose limited civil monetary penalties is integral.

We submit that this argument fails because: (a) the *Katchen* case does not apply to involuntary defendants in penalty proceedings; and (b) in any event, there would be no "dismemberment" of the statutory scheme if Congress allowed *de novo* jury trials in district court in penalty cases.[30]

A. The rationale of Katchen is not applicable to civil penalty adjudications for statutory violations.

In *Katchen*, this Court first sustained a bankruptcy court's statutory summary jurisdiction over voidable preferences, expressly limiting its holding as follows (382 U.S. at 332-33, n. 9):

> Rather, our decision is governed by the "traditional bankruptcy law that he who invokes the aid of the bankruptcy court by offering a proof of claim and demanding its allowance must abide the consequences of that procedure. *Wiswall v. Campbell*, 93 U.S. 347, 351." *Gardner v. New Jersey*, 329 U.S. 565, 573. As this is the basis of our

[30] *See* also the panel majority decision in the Irey case, Irey Cert App. 86-96, n. 11.

> decision, we obviously intimate no opinion concerning whether the referee has summary jurisdiction to adjudicate a demand by the trustee for affirmative relief, all of the substantial factual and legal bases for which have not been disposed of in passing on objections to the claim.

The Court sustained the statutory power to affirmatively demand surrender of the voidable preference on the reasoning that once the bankruptcy court "has dealt with the preference issue [in ruling on the creditor's claim] nothing remains for adjudication in a plenary suit," by virtue of *res judicata* and *collateral estoppel*. 382 U.S. at 334; *see* 382 U.S. at 334-35.

Then the Court dealt with the claim that "this reading of the statute violates [the creditor's] Seventh Amendment right to a jury trial." 382 U.S. at 336. The Court recognized that in a plenary suit by the trustee, the creditor would have a Seventh Amendment right to a jury trial. *Id., citing Schoenthal v. Irving Trust Co.*, 287 U.S. 92 (1932). But the Court rejected that claim in *Katchen* on the reasoning that: (1) a creditor's claim in a bankruptcy court is an *equitable* claim to share on a pro rata basis in the *res* of the bankrupt's estate (382 U.S. at 336); (2) the bankruptcy court's jurisdiction to determine the creditor's equitable claim to a share of the *res* encompasses the power to resolve the trustee's objection to the claim on the ground of a preference, 382 U.S. 336-37 *citing, inter alia, Barton v. Barbour*, 104 U.S. 126, 133-34 (1881); and (3) given the doctrine of *res judicata*, the power to determine the preference objection to the creditor's claim encompasses the power to order affirmative relief against the creditor-claimant as a matter of decreeing "complete relief" (382 U.S. at 337-38; quote from p. 338).

Up to this point in the *Katchen* opinion not a word is said about the doctrine of *Beacon Theaters v. Westover*, 359 U.S. 500 (1959) or "dismemberment" of the statutory scheme. The Court's holding on the claim

to entitlement as a matter of constitutional right to a jury is strictly limited to a bankruptcy court's equitable clean-up powers over a creditor who invokes the bankruptcy court's jurisdiction by submitting a claim. In fact, because of Seventh Amendment considerations, one court has held the *Katchen* rationale cannot even be extended to the guarantor on a creditor's note who files a claim in bankruptcy court in the creditor's name in order to protect the guarantor's subrogation rights. *See In Re Beasley-Gilbert's, Inc.*, 285 F.Supp. 359, 361-63 (S.D. Ohio, 1968) (alternative holding). Moreover, the *Katchen* rationale also does not extend to trustee's attempts to bring an action for damages against individuals for a breach of a contract relating to the *res*, see *Hollywood National Bank v. Bumb*, 409 F.2d 23, 24-25 (9th Cir. 1969), nor to counterclaims against creditor-claimants "which do not involve a preference, setoff, voidable lien, or a fraudulent transfer, and which are wholly unrelated to the creditor's claims." See the lower court's decision in the *Katchen* case, 336 F.2d 535, 537 (10th Cir. 1964).

These various restrictions on the reach of the *Katchen* rationale can be illustrated by considering a hypothetical bankruptcy statute. Suppose Congress declared that hereinafter bankruptcy trustees would have summary powers to bring plenary suits against creditors seeking (a) return of the preference and (b) penalties in amounts of $1,000 for constructive frauds by the creditor related to the preference and (c) penalties of up to $10,000 for deliberate frauds. Would such a statute conceivably pass constitutional muster under the *Katchen* rationale? We think not, even granting Congress' special plenary regulatory powers under the Constitution to "establish . . . uniform . . . laws on the subject of bankruptcy" throughout the United States. U.S. Const. art. I, §8; *see Katchen, supra*, 382 U.S at 336. *A fortiori*, such a statute rested strictly on Congress' interstate commerce powers would be invalid.

The *Katchen* opinion then goes on to reject the creditor's "final reliance . . . on the doctrine of *Beacon Theaters v. Westover*, . . . and *Dairy Queen v. Wood*, . . ." 382, U.S. 338. The Court observed that (*id.*, emphasis added):

> The argument here is that the same issues–whether the creditor has received a preference and, if so, its amount–may be presented *either as equitable issues* in the bankruptcy court *or as legal issues* in a plenary suit. . . .

The Court had, of course, just determined that Congress could prescribe non-jury determination of the *substantive issue* of "preference" as a part of determining the creditor-claimant's *equitable* claim to the *res*. In rejecting the final contention based strictly on the *Beacon* case doctrine "which is itself an equitable doctrine. . . ." (*Katchen, supra*, 352 U.S. at 339) the Court stated that *Beacon* and *Dairy Queen* did not involve "a specific statutory scheme contemplating the prompt trial of a disputed claim without the intervention of a jury" (382 U.S. at 339; *see* Gov. Br. at 84) and that "to say that because the trustee could bring an independent suit against the creditor to recover his voidable preference, he is not entitled to have his statutory objection to the claim tried in the bankruptcy court in the normal manner is to dismember a statutory scheme which Congress has prescribed. *See Alexander v. Hillman*, 296 U.S. 222, 243." (*Katchen, supra*, 382 U.S. at 339; *see* Gov. Br. at 84). The "dismemberment" of the statutory scheme would occur because the *Beacon–Dairy Queen* doctrine, if extended to voidable preferences, would necessitate a jury trial on the substantive preference issues regardless of whether the trustee seeks affirmative relief against a claimant who invoked the bankruptcy court's jurisdiction (382 U.S. at 339):

> For, as we have said, determination of the preference issues in the equitable proceeding would in any case render unnecessary a trial in the plenary action because of the *res judicata* effect to which that determination would be entitled.

Thus the *Katchen* rejection of the *Beacon* equity principle follows strictly from the established power of the bankruptcy court to decide the substantive preference issue as a part of its jurisdiction over the creditor's entire "equitable" claim. Nothing in these portions of *Katchen*–by "analogy" (Gov. Br. at 19) or otherwise–would support extension of the bankruptcy court's summary jurisdiction to a plenary suit by the trustee against a creditor who did not invoke the equity powers of the bankruptcy court and who would otherwise have a Seventh Amendment jury right in the trustee's plenary suit. *Cf. United States v. J. B. Williams Co.*, 498 F.2d 414, 428 (2d Cir. 1974). Indeed, to so read *Katchen's* discussion of *Beacon* is to turn the *Katchen* case upside down and, in effect, to use *Katchen* to dismember the Seventh Amendment. *See also* Irey Main Br. at 65-67.

B. In any event, a jury trial on penalty adjudications would not interfere with the statutory scheme.

1. Assuming *arguendo* that the "dismemberment" principle of *Katchen* extended to the OSHA statutory scheme, the policy arguments tendered by the government do not justify overriding the Seventh Amendment jury right.[31] In our main brief we presented our view of the policy interests in favor of recognition of the Seventh Amendment jury right after the administrative process is complete. Irey Main Br. at 71-83. Here we note that if the government's primary argument based on historical evidence fails, then the Seventh Amendment is indeed to be viewed as "a strong shield against

[31]We submit that these cases are, in any event, governed by the clear command of the Seventh Amendment. *See* Irey Main Br. at 71-75.

governmental oppression." Gov. Br. at 37; *see* our discussion of *Duncan v. Louisiana*, 391 U.S. 145 (1968) and *United States v. United States District Court*, 407 U.S. 297 (1972) at Irey Main Br., 76-79. Moreover, in attempting to persuade this Court that the Founding Fathers would not have deemed it necessary to guard against federal governmental oppression in the very category of cases that triggered revolutionary ferment against the British Government (*i.e.*, civil penalty and forfeiture proceedings) the Government argues, *inter alia*, (Gov. Br. at 43):

> Moreover, an independent judiciary with life tenure was now provided for and the abuses of judges removable at whim by the Crown were no longer to be feared. . . .

Yet, if the Government's "Article I–plenary power–public rights" theory is accepted, then all defendants in civil governmental penalty proceedings will be deprived of the constitutional guaranty of an Article III independant judge on any issues in their cases. *See* p. 33 *supra*.[32]

Finally, we are also told that since "even criminal fines up to at least $500 may be exacted without the intervention of a jury" (Gov. Br. at 82) "[i]t would be most remarkable if . . . the Seventh Amendment were construed . . . to require a civil jury trial where the Sixth Amendment would not interpose a jury if the penalties were criminal." (*Id.*) This argument also cuts the other way. Assuming criminal defendants are entitled to jury trials in cases where the potential fine is above $500, it would be most remarkable, in the face

[32]Conversely, we agree with the Government's observation concerning its "Article I–plenary power–public rights" theory (Gov. Br. at 58):

> Yet, it is not easy to reconcile such a rule with the assumption that the Seventh Amendment was meant to interpose a screen of ordinary citizens between the government and the people in civil cases.

of the Seventh Amendment's express protection of the jury right in "common law" actions where more than $20 was at stake, if that jury right could disappear by labeling the case "civil." Indeed, a corporate defendant (such as petitioners here) is in exactly the same posture with respect to exposure to penalties in *any* criminal case where the maximum fine is $10,000, a sum that is typically the maximum fine for criminal cases under title 18 of the U.S. Code, and also happens to be the maximum fine for criminal prosecutions under Section 17(e) of OSHA. *See* 29 U.S.C. §666(e).[33]

Both the Seventh Amendment–limited by its terms to cases in excess of twenty dollars–and the Sixth Amendment pose "line-drawing" problems in terms of the minimal level of severity of punishment required before the jury right comes into play. Those line-drawing problems are present not merely with respect to monetary penalties, but also with respect to length of prison terms for purposes of differentiating between petty and criminal offenses in the context of the Sixth Amendment. *E.g., Baldwin v. New York*, 399 U.S. 66 (1970). The various choices made by the Court in resolving these issues do not provide an appropriate basis for setting the contours of the jury right under either constitutional provision with respect to substantive categories of cases. *See Baldwin v. New York, supra*, 399 U.S. at 73 (opinion of Justice White); Irey Main Br. at p. 61. *See also* our discussion of the Fifth Circuit's "single red sou" argument in the *Atlas* case in our main brief at 46, n. 23.

Thus the policy considerations in favor of recognition of a Seventh Amendment jury right remain substantial, particularly in the context of a "civil" statute which is the moral equivalent of a federal homicide statute for

[33]It is the "maximum authorized penalty" under the statute in question that provides the "line-drawing" standard for differentiating "petty" from "serious" offenses under the Sixth Amendment. *See Baldwin v. New York*, 399 U.S. 66, 68 (1970) (opinion of Justice White).

employers charged with knowingly or negligently creating homicidal risks for their workers. Turning to the Government's "dismemberment" policy arguments, we submit there is little basis for believing that recognition of a *de novo* jury right in district court after the administrative process is complete will interfere with the regulatory interests represented by the statute.

2. The Government, relying on the legislative history of OSHA, argues (Gov. Br. at 88):

> That Congress rejected juries as factfinders is unsurprising given its repeated emphasis on the related enforcement goals of speedy final abatement orders, expert determination, and nationwide uniformity of both obligations and results. Leg. Hist. 144, 194-195, 462-471, 845, 854. Those goals are basically incompatible with the delays and unpredictable *ad hoc* determinations of juries. . . .

Of course, any law enforcement program—civil or criminal—may require some "expert" determinations (*e.g.*, insanity defenses), speedy justice, and nationwide uniformity of obligations and results. We do not doubt Congress desired these characteristics for OSHA, and, indeed, for every enforcement statute in the United States Code. But neither the legislative history nor analysis of the statutory scheme supports the contention that a jury right in penalty cases after the administrative process is complete will seriously interfere with these desired goals.

The Government emphasizes that (Gov. Br. at 84, footnote omitted):

> Congress created the Review Commission for the overriding equitable purpose of assuring the swift issuance of injunctions directing abatement of work-related hazards threatening employees. The Act's *raison d'etre* is abatement, not penalty assessments, which were included only to promote

> voluntary abatement by employers prior to inspection. . . .

See also Gov. Br. at 84, n. 97. If that is so, then in those cases in which penalties are sought for past violations of the Act under 29 U.S.C., §666(a)-(c) (rather than failure to abate under 29 U.S.C., §666(d)) there can be little risk of interference with the Act's *raison d'etre* (*i.e.*, abatement, not penalty assessment) from a jury trial.

But the Government's emphasis on penalties for past violations as intended to deter future violations does focus attention on the real policy question relating to the *Act's* enforcement goals. As the House Committee Report puts it (Leg. Hist. 853, 856), "Death and disability prevention is the primary intent of this bill. Although possible penalties for violation may be an important deterrent, they are only a partial solution."

Now who is to be "deterred" from violating the Act, and what is necessary to achieve the legislative goal of deterrence? The OSHA statute covers practically the entire business world in our country. Specifically, according to the Government, "the Act covers nearly 65 million workers and 5 million workplaces." *See* Gov. Br. at 90, n. 102. This Court needs no statistical barrage to recognize that we are not dealing here with a regulatory scheme aimed at just one industry, where the employers can perhaps be presumed to share some common "expertise" with the regulators. Nor does the Act aim just at the powerful rich companies with the lawyers and personnel safety experts to cope with highly technical regulations. If OSHA is ever to work *as a deterrent to future violations*, the rules and regulations must be capable of self-application by the average non-expert American businessman, operating without teams of lawyers and safety experts to explain to him his primary legal duties and obligations. Indeed, when it remembered that "the Secretary's current inspection force stands at less than 1,300, an increase of almost

1,000 from Fiscal 1972," (Gov. Br. at 90, n. 102) it is apparent that in deterrent terms OSHA will be a dead letter if the rules are not capable of self-application. Thus the *regulations* in this statutory scheme *must be drawn with a view toward their application by lay businessmen.* This means that the *expertise* function comes into play primarily in the formulation of the regulation, a function placed by the Act in the hands of the Secretary and which is not involved in this case. When it comes to deterring future businessmen from violating the Act by punishing past violations, the critical element is to be certain that the rules are capable of self-application by business men and their employees, who have a great deal more in common with lay jurors than they do with the expert regulators. A useful role in such a statutory scheme can be played by lay jurors who, under the careful instruction of federal district judges informed as to the purpose of the rule by virtue of a complete administrative record, must then apply the rule just as the businessman-defendant must apply it. If a particular rule or regulation is so bound up "with the statutory and policy matrix in which particular facts are found and are to be evaluated" (Gov. Br. at 88, n. 101) that uniform application by lay jurors is unlikely, the message to the regulators should be to change the rule, not avoid the lay jury.

And these are the judgments which are truly reflected by the legislative history of OSHA. Thus, as the Government states, Congress never even considered juries as factfinders. Gov. Br. at 87. The portions of the legislative history principally relied on by the Government in support of its "dismemberment" contention concern the choices to be made between enforcement by the Secretary of Labor and enforcement by a separate Review Commission. Nobody focused on the possible impact of lay jury participation after completion of the administrative process on the legislative goals.

More importantly, these portions of the legislative history actually involved a simultaneous debate over two issues: (1) where the rulemaking function should be reposed; and (2) where the adjudicatory function should be reposed. Thus the Williams Bill in the Senate (S. 2193), and the Daniels Bill in the House (H.R. 16785) placed the rulemaking function and the adjudicative function with the Secretary of Labor. *See* Leg. Hist. 204, 239-46, 255-58 (S. 2193); *id.*, 893, 940-45; 953-55 (H.R. 16785). The Steiger Amendment (H.R. 19200, Leg. Hist. 763) would have placed the rulemaking function in one independent agency to be called the "National Occupational Safety and Health Board" (Leg. Hist. 764-65, 770-76) and the adjudicative function in another independent agency to be called the "Safety and Health Appeals Commission." Leg. Hist. 785-95. The compromise position (which ultimately prevailed) was represented by the Javits Amendment (Amendment No. 1060 to S. 2193, *see* Leg. Hist. 380-91). This Amendment left the rulemaking function with the Secretary, shifting only the adjudicative function to an independent agency. Leg. Hist. 381-91.

Senator Javits, in defending his "compromise" (Leg. Hist. at 463), demonstrated his understanding of the distinction for enforcement purposes between rulemaking and adjudication. Leg. Hist. 392-93; 464-65. His remarks do not reflect any genuine emphasis on the need for "expertise" in the adjudicative function. *See* Leg. Hist. 392-93; 462-65; 471-72.

By contrast, the legislative materials regarding the Steiger Amendment do reflect a concern that the rulemaking function be in the hands of qualified experts. Leg. Hist. 877-78. That reflects the fact that this proposal would have split off the rulemaking function. Indeed, in defending this proposal, Rep. Steiger articulated the difference between regulatory programs that cover the whole of American business, and those that

aim at a specific segment or industry (Leg. Hist. at 990):

> It has been argued, Mr. Chairman, that Congress has often placed all the functions of standard setting, inspection and enforcement in one department of the agency. Opponents of the Board cite such acts as the Longshoremen's and Harbor Workers' Safety Act, the Coal Mine Safety Act, the Federal Railroad Safety Act and others. I must point out that each of these acts deals with a specific area of concern and is limited in application. The occupational health and safety legislation before us today deals with every conceivable type of industry and business and I submit that such a responsibility merits and needs a different administrative approach.

In fact, the legislative history shows the real concern of Congress in getting intelligible standards and regulations capable of self-application by American businessmen. This is shown in the legislative history materials reflecting the narrowing of the "General Duty" clause of the Act to reach only those recognized hazards "that are causing or are likely to cause death or serious physical harm . . . to employees. . . ." 29 U.S.C. 655(a). *See* Leg. Hist. 534-35; 880-81; 1092-93; 1186. Here, too, the difference between a general regulatory program for all of American business and a program aimed at one industry or section was pointed out. Leg. Hist. 880-81. The importance to the statutory scheme of intelligible standards was well understood by the Congress, both for penalty purposes (Leg. Hist. 856) and "voluntary compliance." *Id. See generally id.*, 857-60; 879-80.

With respect to the goal of "uniform" law enforcement, the emphasis was on the need for uniform nationwide regulations in place of state-by-state variations (*e.g.*, Leg. Hist. 144; 193; 513) and a nationwide commitment of enforcement resources instead of state-by-state variation in the level of effort and funding that

went into the programs. Leg. Hist. 513; 853-54; 865. Nobody evaluated the impact on the "uniformity" goal of the possible variation in results in particular instances in those small number of cases which even get to a jury where the regulation was sufficiently confusing that lay juries properly instructed by district judges could not apply it consistently to the facts.

3. In sum, there is little basis in the legislative history for contending that a jury trial, after the administrative process is complete, will interfere with the aims of the Act. Nor is there any basis for concern that allowing a jury right will crowd the dockets of the federal courts. Thus, the Government argues that "OSHA is currently issuing more than 100,000 citations annually, 5 per cent or 5000 of which are contested"—a figure which constitutes fully one-third of the administrative penalty cases reported by Professor Goldschmid for the entire federal establishment in 1972, and threatens to place a large number of "additional cases in a [district court] system 'already being engulfed by a tidal wave of litigation.'" Gov. Br. at 89-90, n. 102. But examination of the "Monthly Status Report of OSAHRC Decisions Which Have Been Appealed," dated October 1, 1976 (available from the Public Information Office of O.S.H.R.C.) reveals that from May 15, 1972 through to September 8, 1976, a total of 290 cases have been appealed from the administrative adjudication to the Court of Appeals.[34] That represents an average of 52 cases a year.[35] What kind of an increase can seriously be projected if a *de novo* jury right were allowed by Congress, especially when the average dollar amount at stake for serious violations has been $617, for willful and repeated violations, $409, and for non-serious

[34] A copy of this report is attached hereto as Appendix A.

[35] This figure was reached by dividing the total number of cases by five years, seven months (the effective date of OSHA through November 1, 1976) and rounding to the nearest whole number.

violations, $12? *See* Gov. Br. at 82, n. 92. Indeed, what kind of an increase can seriously be projected when, for the past 200 years the Congress in the vast majority of penalty cases has allowed *de novo* jury rights? *See* Irey Main Br. at 83-86. Thus the 1976 Annual Report of the Director of the Administrative Office of the United States Courts, presents at p. 86, Table 19, a summary of all civil cases pending in the United States district courts for the past nine fiscal years, broken down by nature of suit. *See* Appendix B hereto. For the year 1976, a total of 140,189 suits are pending in all U.S. district courts, 1,692 of which represent governmental forfeiture and penalty cases. In percentage terms, this represents 1.2 per cent of the total. There may be a tidal wave of litigation in our federal courts, but nothing this Court does in this category of cases is going to have any impact on it. More fundamentally, these considerations are not sufficient to save the penalty provisions of OSHA in the face of the clear command of the Seventh Amendment. *Cf., Curtis v. Loether, supra,* 415 U.S. at 198.

CONCLUSION

For the foregoing reasons, the judgments of the Court of Appeals should be reversed.

Respectfully submitted,

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APPENDIX A

OCTOBER 1, 1976

MONTHLY STATUS REPORT
OF
OSAHRC DECISIONS
WHICH HAVE BEEN APPEALED

Distribution
- Commissioners
  - Chief Legal Counsel
  - All staff attorneys
- Executive Director
  - Executive Secretary
  - Director, M.I.S.
  - Director of Public Information
  - Review Staff
- Chief Administrative Law Judge
  - All Judges
  - ibrary

NOTE: The appeal was filed by the Respondent unless indicated. An asterist (*) beside the case name means that the appeal was filed by the Complainant (Secretary of Labor).

SOURCE – Public Information Office of the Occupational Safety and Health Review Commission

OSAHRC Docket No.	Case Name	Filed	Decided	Court Docket or Citation
477	Accu-Namics	7/26/1974	7/11/1975 Denied-Rhrg.	515 F.2d 828 (5th Cir., 1975)
477	Accu-Namics		9/26/1975 Denied-Rhrg.	521 F.2d 814 (5th Cir., 1975)
477	Accu-Namics		3/29/1976 Cert. Denied	96 S.Ct. 1492
5284	Ace Sheeting & Repair Co.	2/23/1976		76-1481 (5th Cir., 1976)
5599	Allis-Chalmers Corp.	12/12/1975	7/28/1976 Affirmed	75-2125 (7th Cir., 1975)
1228	*Alsea Lumber Co. (See Hendrix, Raymond)	5/25/1973	2/24/1975 Affirmed	511 F.2d 1139 (9th Cir., 1975)
9392	American Airlines	1/06/1976	6/04/1976 Withdrawn	__F.2d__ 76-4001 (2nd CA)
10	American Smelting & Refining Co. (Am. Smelt. & Ref. Co. V. OSAHRC, Un. Steelworkers of Amer., Local 461 and Peter J. Brennan, Sec. of Labor	10/09/1973	7/15/1974 Affirmed	501 F.2d 504 (8th Cir., 1974)

2578	Ames Crane & Rental Service	8/06/1975	4/01/1976 Denied	532 F.2d 123 (8th Cir., 1976)
3769	Amoco Oil Co.	3/04/1976		76-1220 (7th Cir., 1976)
3322	*Anchorage Plastering Co.	8/08/1975		__F.2d__ 75-2747 (9th CA)
3439	Anning-Johnson Co. (Anning-Johnson Co. & Workinger Electric, Inc. v. U.S., OSAHRC & Peter J. Brennan, Secretary of Labor)	5/13/1974	5/27/1975 Reversed	516 F.2d 1081 (7th Cir., 1975)
3701	*Aqua View Apts. (See Lacy, Franklin R.)			
2375	Arkansas-Best Freight Systems, Inc.	4/16/1975	1/29/1976 Denied	529 F.2d 649 (8th Cir., 1976)
10198	Armor Construction & Paving, Inc.	2/07/1975	3/13/1975 Dismissed	75-4028 (2nd Cir., 1975)
425	Armor Elevator Co., Inc.	10/06/1972	2/27/1973 Dismissed	73-2249 (6th Cir., 1973)
426	Armor Elevator Co., Inc.	10/06/1972	2/27/1973 Dismissed	73-2249 (6th Cir., 1973)

OSAHRC Docket No.	Case Name	Filed	Decided	Court Docket or Citation
1018	Ashworth, Uriel G., Masonry Contractors, Inc.	3/25/1975	3/03/1976 Affirmed & remanded in part w/instructions)	538 F.2d 562 (4th Cir., 1976)
3824	Atlantic & Gulf Stevedores, Inc.	2/05/1976	6/01/1976 Dismissed	75-2454 (3rd Cir., 1975)
3870	Atlantic & Gulf Stevedores, Inc.	2/05/1976	6/01/1976 Dismissed	75-2454 (3rd Cir., 1975)
4019	Atlantic & Gulf Stevedores, Inc.	2/05/1976	6/01/1976 Dismissed	75-2454 (3rd Cir., 1975)
4517	Atlantic & Gulf Stevedores, Inc.	2/05/1976	6/01/1976 Dismissed	75-2454 (3rd Cir., 1975)
4997	Atlantic & Gulf Stevedores, Inc.	2/05/1976	6/01/1976 Dismissed	75-2454 (3rd Cir., 1975)
6741	Atlantic & Gulf Stevedores, Inc.	12/29/1975	5/18/1976 Dismissed	75-2453 (3rd Cir., 1975)
6961	Atlantic & Gulf Stevedores, Inc.	3/01/1976	5/18/1976 Dismissed	75-2453 (3rd Cir., 1975)

2818	Atlantic & Gulf Stevedores, Inc.	6/06/1975	3/26/1976 Affirmed	534 F.2d 541 (3rd Cir., 1976)
2100	Atlantic Marine Inc. and Atlantic Dry Dock Corp.	1/28/1975	12/08/1975 Vacated	524 F.2d 476 (5th Cir., 1975)
2101	Atlantic Marine Inc. and Atlantic Dry Dock Corp.	1/28/75	12/08/1975 Vacated	524 F.2d 476 (5th Cir., 1975)
1130	Atlas Roofing Co.		3/22/1976 Cert. Granted	96 S.Ct. 1458
1130	Atlas Roofing Co. (Atlas Roofing Co., Inc. v. OSAHRC & John T. Dunlop, Secretary of Labor	6/04/1973	8/08/1975 Affirmed	518 F.2d 990 (5th Cir., 1975)
10686	Baltimroe & Ohio RR Co.	12/01/1975		__F.2d__ 75-2163 (D.C. CA)
10832	Baltimore & Ohio RR Co.	12/01/1975		__F.2d__ 75-2163 (D.C. CA)
557	Beall Construction (Beall Const. Co. v. OSAHRC et al)	4/24/1974	12/18/1974 Affirmed	507 F.2d 1041 (8th Cir., 1974)
3901	Beatty Equipment Leasing Inc.	7/09/1976		76-2497 (9th CA)
5064	Bechtel Power Corp.	5/06/1976		76-1365 (8th Cir., 1976)
8392	Bethlehem Steel Corp.	11/14/1975	7/20/1976 Affirmed/ Vac./Part	__F.2d__ 75-2301 (3rd CA)

OSAHRC Docket No.	Case Name	Filed	Decided	Court Docket or Citation
1988	Bloomfield Mech. Contr. Inc., & Bloomfield-Blumin, a Joint Venture (Bloomfield Mech. Contr. Inc., V. OSAHRC & Peter J. Brennan Sec./Labor	5/15/1974	8/11/1975 Remand	519 F.2d 1257 (3rd Cir., 1975)
2944	Boise Cascade Corp.	2/06/1976		76-1281 (9th Cir., 1976)
6435	Bonners Ferry Lumber Co.	11/11/1975	4/23/1976 Dismissed	__F.2d__ 75-3468 (9th CA)
1166	*Bounds, J.W., d/b/a Pearl St. Erection Co. (Peter J. Brennan, Sec. of Labor v. OSAHRC and J.W. Bounds (Pearl St. Erection Co.)	3/09/1973	12/11/1973 Affirmed	488 F.2d 337 (5th Cir., 1973)
83	*Bratcher, Norman R., Co.	4/26/1973	8/24/1973 Dismissed	73-1927 (5th Cir., 1973)
1003	*Brent Towing Co. (Peter J. Brennan, Sec. of Labor v. OSAHRC and Brent Towing Co., Inc.)	11/21/1972	7/02/1973 Vacated	481 F.2d 619 (5th Cir., 1973)

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8454	Buckeye Industries, Inc.	2/19/1976		76-1467 (5th Cir., 1976)
1342	Buckley & Co., Inc. (Buckley & Co., Inc. v. Sec. of Labor)	4/15/1974	1/03/1975 Remanded	507 F.2d 78 (3rd. Cir., 1975)
215	Budd Company, Inc. (Ind. Union, UAW and its Locals 813 and 92 v. OSAHRC)	4/10/1974	3/24/1975 Affirmed	513 F.2d 201 (3rd Cir., 1975)
199	Budd Company, Inc. (The Budd Co., v. OSAHRC)	4/10/1974	3/24/1975 Affirmed	513 F.2d 201 (3rd Cir., 1975)
583	*Buhl Laundry & Dry Cleaning, Inc.	6/26/1973	9/24/1973 Dismissed	73-1418 (8th Cir., 1973)
689	*Burik & Savko Lumber & Supply Co., Inc.	2/28/1973	11/08/1973 Withdrawn	73-1182 (3rd Cir., 1973)
11325	Burlington Northern, Inc.	12/15/1975		75-1943 (8th Cir., 1975)
11418	Burlington Northern, Inc.	2/06/1976		76-1098 (8th Cir., 1976)
855	Butler Lime and Cement	11/[illegible]/1974	9/05/1975 Remand	520 F.2d 1011 (7th Cir., 1975)
5106	CTM, Inc.	8/30/1976		76-1789 (10th Cir., 1976)
668	California Rotogravure Co.	3/27/1975		__F.2d__ 75-1743 (9th CA)

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OSAHRC Docket No.	Case Name	Filed	Decided	Court Docket or Citation
14	California Stevedore & Ballast Co. (California Stevedore & Ballast Co. vs. OSAHRC)	11/01/1973	5/21/1975 Affirmed	517 F.2d 986 (9th Cir., 1975)
4675	Candler-Rusche, Inc.	7/16/1976		76-1645 (D.C. Cir., 1976)
10659	Capa Iron Works, Inc.	9/08/1975	10/21/1975 Withdrawn	74-4185 (2nd Cir., 1975)
1186	Cape & Vineyard Div./N Bedford Gas Edison Lgt. Co. (Cape & Vinyard Div. N Bedford Gas/ Edison Lgt. Co. vs. OSAHRC)	7/18/1974	3/03/1975 Reversed	512 F.2d 1148 (1st Cir., 1975)
2547	Caribtow Corp. v. OSAHRC	12/20/1973	3/18/1974 Denied	493 F.2d 1064 (1st. Cir., 1974)
7909	*Carr Erectors	8/03/1976		76-2026 (6th Cir., 1976)
5183	Chesapeake & Ohio Railway Co.	2/18/1975		__F.2d__ 75-1182 (4th CA)
224	Chicago Bridge & Iron Co.	2/26/1973	5/31/1973 Dismissed	73-1181 (7th Cir., 1973)

744	*Chicago Bridge & Iron Co.	3/18/1974	4/22/1975 Vacated & Remanded	514 F.2d 1082 (7th Cir., 1975)
224	Chicago Bridge and Iron Co.	2/24/1975	5/10/1976 Affirmed	535 F.2d 371 (7th Cir., 1976)
5860	Chicago, Milwaukee, St. Paul & Pacific RR Co.	1/15/1976	8/09/1976 Dismissed	75-2112 (7th Cir., 1975)
7978	Chicago, Milwaukee, St. Paul & Pacific RR Co.	12/09/1975	8/09/1976 Dismissed	75-2112 (7th Cir., 1975)
11251	Chicago, Milwaukee, St. Paul & Pacific RR Co.	12/09/1975	8/09/1976 Dismissed	75-2112 (7th Cir., 1975)
6158	Clark, John T. & Son of Boston, Inc.	2/11/1976		__F.2d__ 76-1070 (1st. Cir., 1976)
4863	Clark, John T. & Son of Boston, Inc.	2/11/1976		76-1070 (1st Cir., 1976)
1515	Clarkson Contruction Co.	1/27/1975	1/21/1976 Affirmed	531 F.2d 451 (10th Cir., 1976)
2546	*Consolidated Freightways Corp.	1/08/1974	4/03/1974 Dismissed	74-1032 (7th Cir., 1974)

OSAHRC Docket No.	Case Name	Filed	Decided	Court Docket or Citation
2920	Continental Kitchens, Inc.	2/12/1976		76-1306 (9th Cir., 1976)
1829	*Continental Oil Co.	8/08/1975		__F.2d__ 75-1961 (6th CA)
1296	*Cooney, Don L., Inc. (John T. Dunlop, Secretary of Labor vs. Don L. Cooney, Inc.)	7/30/1973	3/14/1975 Affirmed	__F2d__ 73-2403 (9th CA)
6871	Costello, Bernard S., Inc.	2/11/1976		76-1070 (1st Cir., 1976)
2763	Cox Brothers, Inc.	8/19/1975		__F2d _ 75-2849 (9th CA)
1255	*Custom Painting Company	8/10/1973	11/09/1973 Dismissed	73-2500 (9th Cir., 1973)
2719	Dayton Tire & Rubber Co.	3/27/1975	6/10/1976 Affirmed	__F.2d__ 75-1316 (D.C. CA)
2477	Deering Milliken Co.	1/09/1974	9/20/1974 Dismissed	74-1046 (4th Cir., 1974)
11884	Desarollos Metropolitanos, Inc.	4/12/1976		76-1084 (1st Cir., 1976)

459	Diamond Roofing Co., Inc.	11/14/1973	3/15/1976 Reversed	528 F.2d 645(5th Cir., 1976)
6767	Diebold, Inc.	3/08/1976		76-1278 (6th Cir., 1976)
7721	Diebold, Inc.	3/08/1976		76-1278 (6th Cir., 1976)
9496	Diebold, Inc.	3/08/1976		76-1278(6th Cir., 1976)
4598	Dorey Electric Co.	10/29/1974		__F.2d__ 74-2181 (4th CA)
1589	*Echols, Bill Trucking Co. (Peter J. Brennan v. OSAHRC & Bill Echols Trucking Co.)	3/23/1973	11/13/1973 Remanded	487 F.2d 230 (5th. Cir., 1973)
11115	Empire-Detroit Steel Div., Detroit Steel Corp.	4/08/1976		76-1417 (6th Cir., 1976)
15123	Fattore Construction Co.	3/10/1976	6/04/1976 Dismissed	76-1229 (D.C. Cir., 1976)
4395	Federico, D. Co., Inc.	2/26/1976		76-1084 (1st Cir., 1976)
4155	Felton Construction Co. (Felton Constr. Co. v. OSAHRC)	6/05/1974	6/16/1975 Denied	518 F.2d 49 (9th Cir., 1975)
916	*Fiegen, Ron M., Inc. (Peter J. Brennan, Secretary of Labor vs. the OSAHRC and Ron M. Fiegen, Inc.)	9/03/1974	4/18/1975 Affirmed	513 F.2d 713 (8th Cir., 1975)

OSAHRC Docket No.	Case Name	Filed	Decided	Court Docket or Citation
5625	Fielderest Mills, Inc.	10/04/1974	10/07/1975 Dismissed	__F.2d__ 74-2107 (4th CA)
1734	*Flagg, C.N. & Co., Inc.	10/21/1974	1/12/1976 Denied	74-2362 (2nd Cir., 1976)
3710	*Franzen, Norman d/b/a Norm's Trailer Sales	8/05/1974	9/11/1974 Dismissed	74-1589 (8th Cir., 1974)
344	Friederich, A. & Sons Co.	9/03/1974	3/18/1975 Dismissed	__F.2d__ 74-2171 (2d CA)
890	Frohlick Crane Service, Inc.	8/16/1974	8/19/1975 Affirmed	521 F.2d 628 (10th Cir., 1975)
3203	GAF Corporation	1/13/1976		__F.2d__ 76-1028 (D.C. CA)
4008	GAF Corporation	1/13/1976		__F.2d__ 76-1028 (D.C. CA)
2028	Garland Call Pole Co.	7/07/1975	2/18/1976 Dismissed	__F.2d__ 75-1646 (D.C. Cir.)

4263	Gearhart-Ownes Ind., Inc.	4/21/1975	9/29/1975 Dismissed	__F.2d__ 75-1392 (D.C. Cir.)
2795	Gem Top Mfg., Inc.	5/27/1975		__F.2d__ 75-2160 (9th CA)
2739	General Electric Co.	6/20/1975	8/17/1976 Reversed	__F.2d__ 75-4116 (2nd CA)
190	*Gerosa, Inc. (Peter J. Brennan v. OSAHRC & Gerosa, Inc.)	3/22/1973	2/11/1974 Vacated	491 F.2d 1340 (2nd Cir., 1974)
2671	Getty Oil Co.	3/31/1975	4/23/1976 Affirmed	530 F.2d 1143 (5th Cir., 1976)
504	*Gilles & Cotting, Inc. (Peter J. Brennan v. Gilles & Cotting & OSAHRC)	12/16/1973	10/18/1974 Remanded	504 F.2d 1255 (4th Cir., 1974)
2537	Glen Construction Co., Inc.	1/07/1974	5/19/1976 Vacated	__F.2d__ 74-1031 (D.C.)
2038	Goodrich, B. F. Co. (The B. F. Goodrich Co. vs. OSAHRC)	7/24/1974	4/24/1975 Remanded	__F.2d__ 74-1836 (6th CA)
25	*Gordon, John J. Co. (Brennan v. OSAHRC & John J. Gordon Co.)	5/14/1973	2/25/1974 Remanded	492 F.2d 1027 (2nd Cir., 1974)

OSAHRC Docket No.	Case Name	Filed	Decided	Court Docket or Citation
7031	*Grand Union Co.	12/24/1975	8/16/1976 Dismissed	75-4283 (2nd Cir., 1975)
7533	*Grand Union Co.	12/24/1975	8/16/1976 Dismissed	75-4283 (2nd Cir., 1975)
2538	*Graven Brothers & Co.	5/27/1976		76-1481 (10th Cir., 1976)
112	*Gressani-Gysel Construction Inc.	9/28/1973	1/08/1974 Dismissed	73-2444 (2nd Cir., 1974)
3120	Greyhound Lines-West	7/23/1976		76-2608 (9th Cir., 1976)
722	Gurney Industries	6/29/1973	11/28/1973 Dismissed	73-1813 (4th Cir., 1973)
89	*Hanovia Lamp Div. Canrad Precision Industries, Inc. (Peter J. Brennan v. OSAHRC & Hanovia Lamp Div., Conrad Precision Indus.	2/13/1973	8/14/1974 Remanded	502 F.2d 946 (3rd. Cir., 1974)
141	*Hansen Logging Co.	12/14/1972	5/17/1973 Dismissed	72-3144 (9th Cir., 1973)
2200	*Harrison, B. W. Lumber Co.	6/14/1976		76-2619 (5th Cir., 1976)

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853	Hartwell Excavating Co.	11/26/1974	6/18/1976 Affirmed	537 F.2d 1071 (9th Cir., 1976)
1599	*Haybuster Manufacturing Co.	2/03/1975	10/20/1975 Remanded	524 F.2d 222 (8th Cir., 1975)
111	*Hecherman, B., Iron Works, Inc.	9/28/1973	12/17/1973 Dismissed	73-2445 (2nd Cir., 1973)
4137	Heldenfels Brothers Contractors (Heldenfels Brothers Contractors v. OSAHRC & Peter J. Brennan, Sec. of Labor)	6/26/1974	4/18/1975 Affirmed	__F.2d__ 74-2690 (5th CA)
1228	*Hendrix, Raymond d/b/a Alsea Lumber Co. (Peter J. Brennan, Secretary of Labor vs. OSAHRC and Raymond Hendrix d/b/a Alsea Lumber Company)	5/25/1973	2/24/1975 Affirmed	511 F.2d 1139 (9th Cir., 1975)
4678	*Hermitage Concrete Pipe Co.	3/17/1976		76-1316 (6th Cir., 1976)
644	Hoffman Construction Co.	3/27/1975		__F.2d__ 75-1741 (9th CA)
237	*Holliday, Ira, Logging Co.	6/26/1973	11/29/1973 Dismissed	73-2170 (9th Cir., 1973)

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OSAHRC Docket No.	Case Name	Filed	Decided	Court Docket or Citation
2862	Holt Marine Terminal, Inc.	6/06/1975	3/26/1976 Affirmed	__F.2d__ 75-1584 (3rd CA)
7175	Holt Marine Terminal, Inc.	3/01/1976	5/18/1976 Dismissed	75-2453 (3rd Cir., 1975)
1410	Hormel, George A. & Co.	11/18/1974	7/16/1975 Withdrawn	74-1882 (8th Cir., 1975)
1096	Horne Plumbing & Heating Co.	11/18/1974	2/26/1976 Vacated	528 F.2d 564 (5th Cir., 1976)
1261	Horne Plumbing & Heating Co.	11/18/1974	2/26/1976 Vacated	528 F.2d 564 (5th Cir., 1976)
7047	I.T.O. Corp. of Ameriport, Inc.	12/29/1975	5/18/1976 Dismissed	75-2453 (3rd Cir., 1975)
7281	I.T.O. Corp. of Ameriport, Inc.	3/01/1976	5/18/1976 Dismissed	75-2453 (3rd Cir., 1975)
4107	I.T.O. Corp. of England	2/11/1976		76-1070 (1st Cir., 1976)
4803	I.T.O. Corp. of England	2/11/1976		76-1070 (1st Cir., 1976)
6107	I.T.O. Corp. of England	2/11/1976		76-1070 (1st Cir., 1976)

4897	Independent Pier Co.	3/01/1976	5/18/1976 Dismissed	75-2453 (3rd Cir., 1975)
919	Intercounty Construction Co.	2/13/1974	7/24/1975 Denied	522 F.2d 777 (4th Cir., 1975)
779	*Interstate Glass Co. (Peter J. Brennan v. OSAHRC and Interstate Glass Co.)	1/08/1973	10/26/1973 Affirmed	487 F.2d 438 (8th Cir., 1973)
701	Irey, Frank Jr., Inc.		3/22/1976 Cert. Granted	96 S. Ct. 1458
701	Irey, Frank, Jr., Inc. (Frank Irey, Jr., Inc. V. OSAHRC and Peter J. Brennan)	9/07/1973	11/11/1974 Cert. Granted	519 F.2d 1200 (3rd Cir., 1974)
3116	Irvington Moore, Div. of U.S. Natural Resources, Inc.	5/27/1975		__F.2d__ 75-2159 (9th CA)
4734	J. W. Black Lumber Co.	1/06/1976	4/23/1976 Dismissed	__F.2d__ 76-1010 (8th CA)
2274	*Jamison Bedding, Inc.	8/18/1975	11/18/1975 Withdrawn	__F.2d__ 75-1987 (6th CA)
1689	*Keibler Industries, Inc.	9/24/1973	1/03/1974 Dismissed	73-1822 (3rd Cir., 1974)

OSAHRC Docket No.	Case Name	Filed	Decided	Court Docket or Citation
5958	*Kennecott Copper Corp.	8/13/1976		76-1735 (10th Cir., 1976)
306	*Kesler & Sons Construction Co. (Peter J. Brennan, Secretary of Labor vs. OSAHRC and Kesler & Sons Construction Company)	9/05/1974	3/28/1975 Remanded	513 F.2d 553 (10th Cir., 1975)
9760	Keystone Roofing Co., Inc.	9/03/1975	7/23/1976 Affirmed	__F.2d__ 75-2010 (3rd CA)
9438	Kimball International, Inc.	6/07/1976		76-1542 (7th Cir., 1976)
15109	Kinney Systems, Inc.	5/10/1976	6/14/1976 Dismissed	76-4119 (2nd Cir., 1976)
3701	*Lacy, Franklin R. d/b/a Aqua View Apts.	6/01/1976		__F.2d__ 76-2201 (9th CA)
801	Lake Butler Apparel Co. (Lake Butler Apparel Co. V. Sec. of Labor)	1/24/1973	9/15/1975 Affirmed	519 F.2d 84 (5th Cir., 1975)
1102	Lance Roofing Co.	2/13/1974	3/15/1976 Reversed	528 F.2d 645 (5th Cir., 1976)

1536	Langer Roofing and Sheet Metal Inc.	3/06/1975	11/20/1975 Reversed	524 F.2d 1337 (7th Cir., 1975)
1208	Langer Roofing and Sheet Metal, Inc.	8/12/1974	11/20/1975 Reversed	524 F.2d 1337 (7th Cir., 1975)
383	*Laznski, W.S., Inc.	6/25/1973	10/16/1973 Withdrawn	73-1559 (7th Cir., 1973)
1105	Lee Way Motor Freight, Inc. (Lee Way Motor Freight, Inc. vs. Secretary of Labor)	5/22/1974	2/19/1975 Affirmed	511 F.2d 864 74-1236 (10th CA)
4090	Leone Construction Co.	3/08/1976	5/17/1976 Withdrawn	76-4070 (2nd Cir., 1976)
2455	Les Mares Enterprises, Inc.	6/02/1975	8/16/1976 Reversed	__F.2d__ 75-2196 (9th CA)
4553	Lockrem, Lloyd C., Inc.	3/26/1976	9/13/1976 Dismissed	76-1670 (9th Cir., 1976)
9994	Long Manufacturing Co. I.C., Inc.	6/23/1976		76-1518 (8th Cir., 1976)
285	Mabry, J.L., Grading, Inc.	6/04/1973	9/04/1973 Dismissed	73-2248 (5th Cir., 1973)

OSAHRC Docket No.	Case Name	Filed	Decided	Court Docket or Citation
9	Madden, Dale M. Const., Inc. (Dale M. Madden Const., Inc. v. James D. Hodgson)	5/15/1972	7/29/1974 Dismissed	502 F.2d 278 (9th Cir., 1974)
1363	*Maes, Manuel Const. Co., Inc. (Brennan v. OSAHRC & Manuel Maes Const. Co., Inc.)	6/27/1973	3/28/1974 Affirmed	73-1464 (10th Cir., 1974)
4725	*Marquette Cement Mfg. Co.	3/24/1976		76-4083 (2nd Cir., 1976)
6565	McCarthy, J. A., Inc.	3/05/1976	5/14/1976 Dismissed	76-1262 (3rd Cir., 1976)
7177	McCarthy, J. A., Inc.	3/05/1976	5/14/1976 Dismissed	76-1262 (3rd Cir., 1976)
7522	McCarthy, J. A., Inc.	3/05/1976	5/14/1976 Dismissed	76-1262 (3rd Cir., 1976)
2847	McLean Trucking Co. (McLean Trucking Co. v. OSAHRC & Sec. of Labor)	11/20/1973	9/04/1974 Denied	503 F. 2d 8 (4th Cir., 1974)
4079	Merit Construction Co.	9/08/1975		__F.2d__ 75-2996 (9th CA)

3860	Messina, F. X. Const. Corp. (F.X. Messina Const. Corp. v. OSAHRC and Peter J. Brennan)	6/20/1974	11/07/1974 Affirmed	505 F.2d 701 (1st Cir., 1974)
8845	Mohawk Excavating, Inc.	3/03/1976		76-4068 (2nd Cir., 1976)
364	Mullins, S.D., Co., Inc.	11/14/1973	3/15/1976 Reversed	528 F.2d 645 (5th Cir., 1976)
1588	*Mushroom Transportation Co.	1/02/1974	4/17/1974 Dismissed	74-1014 (3rd Cir., 1974)
12460	*Nabisco, Inc.	11/03/1975	2/18/1976 Dismissed	__F.2d__ 75-3923 (5th CA)
2998	Nacirema Operating Co. Inc.	6/06/1975	3/26/1976 Affirmed	__F.2d__ 75-1584 (3rd CA)
2030	*Nager Electric Co., Inc.	4/06/1973	4/01/1974 Dismissed	73-1506 (2nd Cir., 1973)
673	Nasso, Julius, Concrete Co.	9/30/1974	11/27/1974 Dismissed	__F.2d__ 74-2273 (2d CA)
85	National Reality & Const. Co., Inc. (National Reality & Const. Co., Inc. v. OSAHRC & Peter J. Brennan)	10/17/1972	12/13/1973 Reversed	489 F.2d 1257 (D.C. Cir., 1973)

OSAHRC Docket No.	Case Name	Filed	Decided	Court Docket or Citation
4309	*Nelson, Donald K. Const. Co.	2/23/1976	8/05/1976 Dismissed	76-1112 (10th Cir., 1976)
3367	Noblecraft Industries, Inc.	1/09/1976		__F.2d__ 76-1106 (9th CA)
3710	*Norm's Trailer Sales (See Franzen, Norman)			
5811	Ocean Electric Co.	1/16/1976		76-1060 (4th Cir., 1976)
4459	Olin Constr. Co., Inc.	11/21/1974	9/09/1975 Affirmed	525 F.2d 464 (2nd Cir., 1976)
3486	Olin Construction Company	9/23/1975	4/05/1976 Denied	__F.2d__ 75-4204 (2nd CA)
1468	*Otinger, S.J., Jr., Const. Co. (Peter J. Brennan v. OSAHRC & S.J. Otinger, Jr., Const. Co.	8/29/1973	10/03/1974 Reversed	502 F.2d 30 (5th Cir., 1974)
3443	*P & M Sales, Inc.	7/07/1976	8/11/1976 Dismissed	76-4166 (2nd Cir., 1976)
13562	*PPG Industries, Inc.	3/17/1976		76-1123 (D.C. Cir., 1976)

2821	Pacific Gas & Electric Co.	5/19/1975		__F.2d__ 75-2095 (9th CA)
5056	*Pan American World Airways	7/02/1976		76-4159 (2nd Cir., 1976)
2987	*Paper Products Co., Inc.	9/21/1974	2/03/1975 Dismissed	74-1956 (3rd Cir., 1974)
5796	Penn Central Transportation Co.	2/20/1976	6/09/1976 Dismissed	76-1176 (D.C. Cir., 1976)
738	Penn Central Transportation Co.	1/28/1975		__F.2d__ 75-1102 (4th CA)
3162	Penn-Dixie Steel Corp. (Formerly Continental Steel Corp.)	9/08/1975		__F.2d__ 75-1819 (7th CA)
3069	Pike, Floyd S. Electrical	3/24/1975		__F.2d__ 75-1314 (4th CA)
2459	*Priest, Milton W., d/b/a Wasatch Roofing Co.	1/14/1974	4/02/1974 Dismissed	74-1001 (10th Cir., 1974)
963	Probst, J.F. and Co., Inc.	10/11/1974		__F.2d__ 74-1826 (7th CA)
28	REA Express, Inc. (REA Express, Inc. v. Peter J. Brennan & OSAHRC)	3/30/1973	4/18/1974 Denied	495 F.2d 822 (2nd Cir., 1974)

OSAHRC Docket No.	Case Name	Filed	Decided	Court Docket or Citation
22	*Republic Creosoting Co. (Div. of Reilly Tar & Chem. Corp.) (Peter J. Brennan v. OSAHRC & Republic Creosoting Co., Div. of Reilly Tar & Chem. Corp.)	4/04/1973	8/16/1974 Affirmed	501 F.2d 1196 (7th Cir., 1974)
3028	Ringland - Johnson, Inc.	8/12/1976		76-1687 (8th Cir., 1976)
2692	Rockwell International (formerly N/A Rockwell Corp.)	6/12/1975	8/26/1976 Remanded	__F.2d__ 75-1672 (6th CA)
2875	Rockwell International (formerly N/A Rockwell Corp.)	6/12/1975	8/26/1976 Remanded	__F.2d__ 75-1672 (6th CA)
2617	Rogers, George W. Const. Corp. (George W. Rogers Const. Corp. v. Peter J. Brennan)	1/23/1974	6/26/1974 Denied	498 F.2d 1396 (2d Cir., 1974)
2096	Roth Steel Tube Co. (Roth Steel Tube Co. v. OSAHRC et al)	11/30/1973	4/19/1974 Affirmed	495 F.2d 1373 (6th Cir., 1974)
391	Ryder Truck Lines, Inc. (Ryder Truck Lines, Inc. v. Peter J. Brennan)	10/04/1973	7/18/1974 Denied	497 F.2d 230 (5th Cir., 1974)

1740	*San Jose Crane & Rigging, Inc.	8/30/1973	1/03/1974 Dismissed	73-2662 (9th Cir., 1973)
331	*Santa Fe Trail Transport Co. (Peter J. Brennan v. OSAHRC & Sante Fe Trail Transport Co.)	2/14/1974	10/23/1974 Reversed	505 F.2d 869 74-1049 (10th CA)
12067	Savina Home Ind. Inc.	6/03/1976	7/08/1976 Dismissed	76-1513 (10th Cir., 1976)
2802	Seaboard Coast Line Railroad Co.	11/29/1974		__F.2d__ 74-3984 (5th CA)
10541	Seaboard Coast Line Railroad Co.	1/21/1976	3/15/1973 Dismissed	__F.2d__76-1058 (D.C. CA)
11237	Seaboard Coast Line Railroad Co. and Winston-Salem Southbound Railway Co.	12/22/1975		75-2244 (D.C. Cir., 1975)
11904	Seaboard Coast Line Railroad Co. and Winston-Salem Southbound Railway Co.	12/22/1975		75-2244 (D.C. Cir., 1975)
10732	Seaboard Coast Line Railroad Co.	1/21/1976	3/15/1976 Dismissed	__F.2d__ 76-1059 (D.C. CA)

OSAHRC Docket No.	Case Name	Filed	Decided	Court Docket or Citation
3324	Shaw Construction, Inc.	9/18/1975	7/12/1976 Aff.-Pt/Rev.-Pt./Remanded	534 F.2d 1183 (5th Cir., 1976)
4298	Sheehan, Dan J. Co.	7/05/1974	10/08/1975 Affirmed	520 F.2d 1036 (5th Cir., 1975)
4298	Sheehan, Dan J. Co.		3/22/1976 Cert. Denied	96 S. Ct. 1458
3527	Signode Corp.	5/14/1976		76-1456 (7th Cir., 1976)
4078	Sinapp Co.-Staten Island	12/24/1975	2/11/1976 Dismissed	75-4284 (2nd Cir., 1975)
995	*Smoke Craft, Inc.	7/18/1974	2/13/1976 Reversed	530 F.2d 843 (9th Cir., 1976)
1445	Southeast Contractors, Inc. (Southeast Contractors, Inc. vs. John T. Dunlop, Secretary of Labor)	6/27/1974	3/19/1975 Reversed	512 F.2d 675 (5th Cir., 1975)
1492	*Southern Contractors Service (Peter J. Brennan v. Southern Contractors Service and OSAHRC)	7/19/1973	4/12/1974 Affirmed	492 F.2d 498 (5th Cir., 1974)

1348	*Southern Pacific Trans. Co.	11/29/1974		__F.2d__ 74-3981 (5th CA)
1348	Southern Pacific Transportation Co.	1/10/1975		__F.2d__ 75-1091 (5th CA)
10332	Southern Pacific Transportation Co.	12/15/1975		75-4331 (5th Cir., 1975)
5566	Southern Railway Co.	1/15/1975	2/09/1976 Affirmed	__F.2d__ 75-1055 (4th CA)
5566	Southern Railway Co.		7/23/1976 Pet. for Cert. Filed	76-100 (45 LW 3101)
5960	Southern Railway Co.	12/19/1975	6/04/1976 Withdrawn	75-2493 (6th Cir., 1975)
6526	State Sheet Metal & Roofing	4/02/1975	9/15/1976 Vacated	__F.2d__ 75-1355 (6th CA)
6316	Stockwell Mfg. Co.	6/19/1975	5/18/1976 Denied & Dismissed	536 F.2d 1306 (10th Cir., 1976)
4498	Structural Systems, Inc.	8/12/1974		__F.2d__ 74-2520 (9th CA)

OSAHRC Docket No.	Case Name	Filed	Decided	Court Docket or Citation
33	Swatek, M. A., and Company	6/25/1973	9/28/1973 Dismissed	73-1445 (10th Cir., 1973)
9998	Sweeney, Harold E. Corp.	9/03/1975	7/23/1976 Affirmed	__F.2d__ 75-2010 (3rd CA)
4882	Terminal Services, Inc.	2/11/1976		76-1070 (1st Cir., 1976)
5579	Terminal Services, Inc.	2/11/1976		76-1070 (1st Cir., 1976)
6159	Terminal Services, Inc.	2/11/1976		76-1070 (1st Cir., 1976)
11903	Texaco, Inc.	4/19/1976	7/13/1976 Dismissed	76-1318 (10th Cir., 1973)
18	Texports Stevedore Co., Inc. (Texports Stevedore Co., Inc. v. Sec. of Labor and OSAHRC)	3/16/1973	9/20/1973 Denied	484 F.2d 465 (5th Cir., 1973)
370	*Thorleif Larsen & Sons, Inc.	3/08/1973	1/22/1974 Dismissed	73-1232 (7th Cir., 1973)
11166	Titanium Metals Corp. of America	12/12/1975		75-3724 (9th Cir., 1975)
11515	Titanium Metals Corp. of America	12/12/1975		75-3724 (9th Cir., 1975)

1556	Todd Shipyards Corp.	4/22/1975		__F.2d__ 75-1909 (9th CA)
12510	Todd Shipyards Corp.	3/17/1976		76-1336 (9th Cir., 1976)
687	Transcon Lines (Transcon Lines vs. OSAHRC)	7/01/1974	4/16/1975 Affirmed (not published)	76-1413 (10th CA)
155	*U.S. Pipe & Foundry Co.	2/23/1973	5/04/1973 Dismissed	73-1176 (6th Cir., 1973)
2081	*Underhill Const. Corp. & Dic Concrete Corp. (Peter J. Brennan Sec. of Labor vs. OSAHRC & Underhill Construction Corp.)	5/02/1974	3/10/1975 Denied	513 F.2d 1032 (2nd Cir., 1975)
2081	Underhill Const. Corp. & Dic Concrete Corp. (Underhill Construction Corp. & Dic. Concrete Corp. vs. Peter J. Brennan, Sec. of Labor & OSAHRC)	5/02/1974	3/10/1975 Denied	513 F.2d 1032 (2nd Cir., 1975)
1307	Underhill Construction Co.	3/27/1975	11/24/1975 Denied	526 F.2d 53 (2nd Cir., 1975)
4247	Underhill Construction Co.	5/17/1974	9/20/1974 Dismissed	74-1662 (2nd Cir., 1974)

OSAHRC Docket No.	Case Name	Filed	Decided	Court Docket or Citation
4484	Underhill Construction Co.	5/17/1974	9/20/1974 Dismissed	74-1662 (2nd Cir., 1974)
4504	Underhill Construction Co.	5/17/1974	9/20/1974 Dismissed	74-1662 (2nd Cir., 1974)
4639	Underhill Construction Co.	5/17/1974	9/20/1974 Dismissed	74-1662 (2nd Cir., 1974)
4641	Underhill Construction Co.	5/17/1974	9/20/1974 Dismissed	74-1662 (2nd Cir., 1974)
4643	Underhill Construction Co.	5/17/1974	9/20/1974 Dismissed	74-1662 (2nd Cir., 1974)
4667	Underhill Construction Co.	5/17/1974	9/20/1974 Dismissed	74-1662 (2nd Cir., 1974)
4676	Underhill Construction Co.	5/17/1974	9/20/1974 Dismissed	74-1662 (2nd Cir., 1974)
4716	Underhill Construction Co.	5/17/1974	9/20/1974 Dismissed	74-1662 (2nd Cir., 1974)

4907	Underhill Construction Co.	5/17/1974	9/20/1974 Dismissed	74-1662 (2nd Cir., 1974)
4908	Underhill Construction Co.	5/17/1974	9/20/1974 Dismissed	74-1662 (2nd Cir., 1974)
5075	Underhill Construction Co.	5/17/1974	9/20/1974 Dismissed	74-1662 (2nd Cir., 1974)
5197	Underhill Construction Co.	5/17/1974	9/20/1974 Dismissed	74-1662 (2nd Cir., 1974)
5779	Underhill Construction Co.	5/17/1974	9/20/1974 Dismissed	74-1662 (2nd Cir., 1974)
5795	Underhill Construction Co.	5/17/1974	9/20/1974 Dismissed	74-1662 (2nd Cir., 1974)
6320	Underhill Construction Co.	5/17/1974	9/20/1974 Dismissed	74-1662 (2nd Cir., 1974)
6368	Underhill Construction Co.	5/17/1974	9/20/1974 Dismissed	74-1662 (2nd Cir., 1974)
1697	Union Pacific Railroad Co.	1/27/1975	transferred to 5th Cir.; see below	__F.2d__ 75-1065 (8th CA)
1697	Union Pacific Railroad Company			75-1613 (5th Cir., 1976)

OSAHRC Docket No.	Case Name	Filed	Decided	Court Docket or Citation
4318	Union Railroad Co.	1/06/1975	5/16/1975 Dismissed	__F.2d__ 75-1013 (3d CA)
2786	United Auto Workers, Local 588	7/23/1976		76-1718 (7th Cir., 1976)
2414	United Engineers & Constructors, Inc.	8/18/1975	9/17/1975 Dismissed	__F.2d__ 75-1946 (3rd CA)
7355	United Engineers & Constructors, Inc.	1/15/1976		76-1041 (3rd Cir., 1976)
7355	United Engineers & Constructors, Inc.	1/15/1976		__F.2d__ 76-1041 (3rd CA)
6364	United Parcel Service Inc.	9/08/1976		76-2030 (6th Cir., 1976)
6344	United Parcel Service, Inc.	8/05/1976		76-2030 (6th Cir., 1976)
2975	United States Steel Corp.	1/10/1975	6/23/1975 Dismissed	517 F.2d 1400 (3rd Cir., 1975)
3010	United States Steel Corp.	9/24/1975	6/30/1976 Denied	537 F.2d 780 (3rd Cir., 1976)
4349	United States Steel Corp.	1/10/1975	6/23/1975 Dismissed	517 F.2d 1400 (3rd Cir., 1975)

4684	United States Steel Corp.	1/10/1975	6/23/1975 Dismissed	517 F.2d 1400 (3rd Cir., 1975)
1607	*Verne-Woodrow Co. (James D. Hodgson v. The Verne-Woodrow Co.)	9/07/1973	5/28/1974 Remanded	494 F.2d 1181 73-3134 (5th CA)
31	*Vy Lactos Laboratories, Inc. (Peter J. Brennan v. OSAHRC Vy Lactos Laboratories, Inc.)	4/12/1973	4/05/1974 Remanded	494 F.2d 460 (8th Cir., 1974)
4044	Wallace Roofing Co., Inc.	6/13/1974	8/30/1976 Reversed	__F.2d__ 74-2580 (5th CA)
2459	*Wasatch Roofing Co. (See Priest, Milton W.)			
3064	Water Tunnel Contractors	7/24/1975	1/16/1976 Withdrawn	__F.2d__ 75-4152 (2nd CA)
16109	Western Motors of North Plate, Inc.	9/07/1976		76-1773 (8th Cir., 1976)
3528	Western Steel Mfg. Co.	6/04/1976		76-2224 (9th Cir., 1976)
1087	*Western Waterproofing Co., Inc.	8/18/1976		76-1703 (8th Cir., 1976)
1191	*Weyerhaeuser Company	9/17/1973	12/04/1973 Dismissed	73-2779 (9th Cir., 1973)
1320	White Oak Corp. (White Oak Corp. vs. Secretary of Labor)	9/16/1974	5/14/1975	__F.2d__ 74-2232 (2d CA)

OSAHRC Docket No.	Case Name	Filed	Decided	Court Docket or Citation
3387	Workinger Elec., Inc.	5/13/1974	5/27/1975 Reversed	516 F.2d 1081 (7th Cir., 1975)
2658	Yellow Freight System, Inc.	5/14/1975	2/20/1976 Affirmed (not to be published)	75-1483 (D.C. Cir., 1976)
2658	Yellow Freight System, Inc.		5/20/1976 Pet. for Cert. Filed	75-1683 (44 LW 3703)
245	*York Metal Finishing Co.	6/06/1974	9/09/1974 Dismissed	74-1554 (3rd Cir., 1974)
756	Zaich, Matt J. Const. Co.	6/04/1973	Dismissed	73-1995 (9th Cir., 1973)

APPENDIX B

TABLE 19

CIVIL CASES PENDING JUNE 30, BY NATURE OF SUIT FISCAL YEARS 1968-1976

Nature of suit	Fiscal Years									Percent change 1976 over 1975
	1968	1969	1970	1971	1972	1973	1974	1975	1976	
Total	**82,482**	**86,321**	**93,207**	**100,040**	**101,032**	**101,333**	**107,230**	**119,767**	**140,189**	**17.1**
United States Cases	17,989	19,267	20,465	20,692	21,305	21,442	22,325	26,155	34,288	31.1
Contract	2,697	3,053	3,462	3,278	3,525	3,067	2,491	2,415	2,524	4.5
Land condemnation	2,138	2,253	2,112	2,075	1,777	1,774	1,761	2,136	3,299	54.4
Other real property	979	956	902	943	1,190	1,311	1,652	1,916	2,362	23.3
Tort Actions	3,495	3,335	3,116	2,929	2,572	2,422	2,524	2,773	2,963	6.9
Antitrust	74	86	84	91	117	111	96	113	109	−3.5
Prisoner petitions:										
Motions to vacate sentence	345	538	616	519	553	592	614	654	615	−6.0
Habeas corpus	184	305	396	424	372	353	422	386	426	10.4

TABLE 19

CIVIL CASES PENDING JUNE 30, BY NATURE OF SUIT
FISCAL YEARS 1968-1976–Continued

Nature of suit	Fiscal Years									Percent change 1976 over 1975
	1968	1969	1970	1971	1972	1973	1974	1975	1976	
Prisoner petitions:–Continued										
Civil Rights	18	34	73	96	120	188	203	250	255	2.0
Mandamus, other	168	221	235	268	325	415	351	463	250	–24.4
Forfeiture and penalties	1,158	919	1,040	1,334	1,526	1,679	1,291	1,481	1,692	14.2
Labor suits	1,250	1,244	1,344	1,489	1,474	1,350	1,477	1,457	1,739	19.4
Tax suits	2,990	2,690	2,655	2,519	2,301	2,249	2,415	2,327	2,504	7.6
Social Security laws	1,147	1,585	1,935	2,160	2,577	2,595	3,397	5,595	10,122	80.9
Narcotic Addict Rehabilitation Act	179	451	554	519	522	368	207	82	57	–30.5
Civil Rights	172	289	388	532	620	884	1,139	1,443	1,946	34.9
All other U.S. cases	995	1,308	1,553	1,516	1,734	2,084	2,285	2,664	3,325	24.8
Private Cases	64,493	67,054	72,742	79,348	79,727	79,891	84,905	93,612	105,901	13.1
Contract	15,655	15,894	17,385	19,293	19,079	18,482	18,973	21,109	23,678	12.2
Real property	1,581	1,457	1,569	1,720	1,421	1,402	1,538	1,765	1,835	4.0
Federal Employers' Liability Act	1,838	2,022	2,090	2,107	1,872	1,605	1,525	1,544	1,677	8.6
Motor vehicle personal injury	11,828	11,592	11,191	10,311	8,762	7,758	7,421	6,812	6,438	–5.5
Marine personal injury	10,552	10,486	10,300	10,436	9,413	7,659	6,794	6,602	6,727	1.9
Other personal injury	7,022	7,301	7,752	8,136	8,121	7,961	8,074	8,908	10,248	15.0
Other tort actions	1,894	1,933	2,089	2,331	2,323	2,540	3,408	4,050	4,750	17.3
Antitrust	1,360	1,623	1,933	2,213	2,563	2,734	2,492	2,526	2,778	10.0
Prisoner petitions:										
Habeas corpus	2,075	2,512	3,043	3,370	3,133	2,978	3,142	3,281	3,715	13.2
Civil Rights	561	772	1,281	1,933	2,403	3,069	4,146	5,241	6,341	21.0
Mandamus and other	268	294	289	390	388	317	273	194	150	–22.7
Copyright, patent and trademark	2,497	2,551	2,742	2,799	2,739	2,634	2,573	2,609	2,861	9.7
Labor suits	1,966	1,961	2,126	2,543	2,609	2,810	3,256	4,292	5,469	27.4
Securities, commodities and exchanges	1,184	1,416	1,925	2,893	3,334	3,489	3,825	4,047	4,166	2.9
Civil Rights	1,652	2,357	3,616	4,639	5,661	6,785	8,159	10,400	12,911	24.1
Interstate Commerce	656	750	1,056	1,759	3,235	4,766	6,285	7,261	8,743	20.4
All other	1,904	2,133	2,355	2,475	2,671	2,902	3,021	2,971	3,414	14.9

NOTE: This table summarizes pending civil cases by nature of suit appearing in Table C-3a in the appendix with more detail being provided for the "all other" class.

SOURCE – 1976 Annual Report of the Director's Administrative Office of the United States Courts, p. 86.